

OVERSIGHT OF THE OFFICE OF GOVERNMENT ETHICS

HEARING BEFORE THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT OF THE COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE NINETY-NINTH CONGRESS

FIRST SESSION

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OVERSIGHT OF THE OFFICE OF GOVERNMENT ETHICS

WEDNESDAY, APRIL 24, 1985

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT
OF GOVERNMENT MANAGEMENT,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The subcommittee met at 9:35 a.m. in room SD-342 of the Dirksen Senate Office Building, Hon. William S. Cohen (chairman of the subcommittee) presiding.

Present: Senators Cohen and Levin.

Staff present: Susan M. Collins, staff director; Mary Berry Gerwin, counsel; Frankie deVergie, chief clerk; Rachel D. Harlan, assistant chief clerk; Ralph O. White, minority professional staff assistant.

OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. The committee will come to order.

The principle that a public office is a public trust dates back to ancient times. Cicero wrote that the administration of government, like the office of trustee, must be conducted for the benefit of those entrusted to one's care, not for those to whom it is entrusted. The theme that our Government officials must be held to the highest standards of a fiduciary runs consistently throughout our country's law and jurisprudence.

Congress and the executive branch have followed this principle of public trust by taking steps to assure that Government employees maintain high standards of integrity, honesty and impartiality in performing their duties.

Nearly 20 years ago, President Johnson issued an Executive order setting forth standards of conduct for Federal employees. This Executive order has been used over the years to identify and resolve conflicts of interest and has been enforced by strong disciplinary actions against employees such as suspension, reassignment of duties, and even dismissal.

The culmination of congressional efforts to reinforce the concept of public office as a public trust was the enactment of the Ethics in Government Act of 1978. This landmark legislation strengthened Federal conflict of interest laws, provided for the appointment of an independent counsel to investigate allegations of wrongdoing by high level officials and imposed financial disclosure requirements on all three branches of Government.

In addition, the act established the Office of Government Ethics to oversee, implement, and enforce the ethics laws and standards governing executive branch officials and employees.

The responsibilities of the Ethics Office include advising Federal agencies and officials on how to comply with the ethics laws and the Executive order, reviewing financial disclosure reports filed by Presidential nominees and high-ranking officials, and monitoring the implementation of the post-Government employment restrictions of the Ethics Act. Perhaps the greatest role assigned to the Director of the OGE is acting as the chief arbiter in questions involving the ethical conduct of executive branch employees.

Today the subcommittee is going to review the performance of this crucial office.

Concerns have surfaced that the Office of Government Ethics is not fully implementing the provisions of the Executive order on ethical conduct. The Executive order requires Federal employees to avoid both the appearance of and actual conflicts of interest in performing their official duties. In testimony before the Senate Judiciary Committee during the nomination hearings of Edwin Meese, however, David Martin, the Director of the OGE, asserted that the appearance standard in the Executive order is "aspirational" only and not a mandatory rule. Instead he maintained that only conduct resulting in actual conflicts of interest violates the Executive order.

More recently in press interviews and in testimony before an Armed Services subcommittee, Mr. Martin has labeled the appearance standard as being "unenforceable."

The subcommittee is going to explore today the basis for and the implication of the OGE's position on cases involving the appearance of impropriety. We are going to explore whether Mr. Martin's ruling deviates from the past policy of the Office, whether it sends a dangerous signal to Government employees about the ethical standards they are to observe, and whether it erodes the fundamental premise of public office as a public trust.

We are also going to inquire whether past policies or past announcements are, as Mr. Martin suggests, unrealistic, unenforceable and perhaps even undesirable. Since ethical questions inevitably require difficult judgments, these issues are not easy ones to resolve.

The hearing is going to address how well the OGE is performing its other duties under the Ethics in Government Act. We will examine, for example, the performance of the OGE in overseeing and implementing the so-called revolving door provisions which prevent former Government officials from switching sides and representing a private client in the same matter for which they previously represented the Government.

Recently, several stories in the press have focused on cases in which Government employees, particularly in the Defense Department, have gone to work for defense contractors on whose contracts they worked while in Government service. These cases have raised speculation that employment prospects may have influenced the employee's decision on contracts and that the revolving door is opened too wide, allowing conflicts of interest to go undetected. I

hope the hearing will shed some additional light on how well the post-Government employment laws are working.

The subcommittee is also going to hear testimony on the confidential financial disclosure system in executive agencies. Under this system about 100,000 Government employees who are not subject to public financial disclosure requirements must file confidential financial statements with their agency ethics officials. These reports are important to ensure that midlevel employees, many of whom are responsible for the day-to-day decisions of Government are acting free from conflicts of interest. Department of Justice opinions are disputing the legality of the Confidential Disclosure reporting requirements and have jeopardized the enforceability of the system. We are going to explore what actions the OGE has taken to resolve the legal questions raised by the Justice opinions.

In reauthorizing the Office of Government Ethics in 1983, this subcommittee, as well as Congress, as a whole, reaffirmed its commitment to a strong independent Office of Government Ethics. Again today, the subcommittee is going to review the policy of the OGE to determine how well that office is fulfilling its statutory mandate.

The first witness this morning is David Martin, who is the Director of the Office of Government Ethics. We will then hear from Bernhardt Wruble, the first Director of the OGE and Ann McBride of Common Cause. Finally, we will hear from officials representing the Department of Defense and the General Accounting Office.

I look forward to receiving the testimony today and believe it is going to provide some valuable insight on how well the Ethics Program in the executive branch is working.

So our first witness today is Mr. Martin, Director of OGE. He has served as the Government's chief ethics officer since he was confirmed by the Senate in June 1983.

TESTIMONY OF DAVID H. MARTIN, DIRECTOR, OFFICE OF GOVERNMENT ETHICS

Mr. MARTIN. Good morning, Mr. Chairman. I appreciate the opportunity to appear here before the committee and the subcommittee and to clarify my position on a variety of issues that you have talked about in your opening remarks. I would like to clarify two things that you indicated in your opening statement.

One is that I said that the standards of conduct were unenforceable, before an Armed Services Committee in the House. I said that section 208 was difficult to enforce. It was just difficult to determine when somebody is negotiating for employment. That was the context in which I testified there.

I did not, I don't think, ever say that the standards of conduct regarding the caution against avoiding appearances was only aspirational. I said, in a letter to Senator Levin following these hearings, I indicated that I thought that the standards married regulatory concepts with aspirational concepts. That is still the position I take.

I have a prepared statement which I would request be submitted for the record.

Senator COHEN. It will be included.

Mr. MARTIN. In addition, I have some unprepared comments I would like to start off with, and then I will entertain as many questions as you or the other members might have.

First, as regards the confidential reporting system which you mentioned in your opening statement, after the Department of Justice made a final decision in June 1984, that, in fact, the confidential system that we had in place was without legal authority, following that June 1984 decision, we attempted in the executive branch to accommodate the various competing interests of the departments and agencies in trying to work out an administrative solution to that problem. We ultimately concluded that—at least my office concluded that legislation was the preferable route to go.

I included in a proposed amendment—I included among a number of amendments to the Ethics in Government Act an amendment to provide authority for a new confidential reporting system that would require less information than was required by public filers. There was not a lot of support for all of the other amendments that I had suggested. Therefore, I propose that we go forward only on the amendment which authorized the confidential reporting system.

I understand that yesterday there was forwarded proposed legislation to the President pro tempore and Speaker of the House, legislation to accomplish just that. It would authorize the President to implement a system of confidential reporting and delegate that authority to the Office of Government Ethics.

Senator COHEN. Requiring less information?

Mr. MARTIN. Yes. It would give the President and the Director, through delegation, authority to implement essentially what is now what was the confidential reporting system pursuant to the Executive order and require less information than was required by public filers.

Senator COHEN. Let me just ask you as a matter of policy, why would you want to have less information, if, in fact, the information is confidential? I don't understand objections to requiring people who come in at midlevel to file when this information stays entirely confidential. This is not released to the press. It is not released to the public, and yet we are going to give agencies less information.

It seems to me that it is contradictory.

Mr. MARTIN. Here is the reason why, Senator. We do not need, for people who only serve on advisory boards who come in twice a month or for full-time employees in certain positions which we have designated as vulnerable, we don't need all that information.

Senator COHEN. How do you know?

Mr. MARTIN. It is just the considered judgment of my staff that it is unnecessary, and I believe that. I don't think—I think also that what is publicly filed now is not necessary. That is my personal view, but certainly for confidential filers and in terms of reviewing, there are many, many man-hours lost or consumed in reviewing.

Senator COHEN. Let me explore that. Why is the information currently required in public relations forms unnecessary?

Mr. MARTIN. I don't believe that you need to have—I think you need to know assets. You need to know income. You need to know exchanges. You need to know gifts, but you don't need to know in

the detailed categories that we now have in the law. That is my personal view. I know it is shared by many members of my staff.

Senator COHEN. In what sense? What kind of detail would you think should be omitted?

Mr. MARTIN. I think you should have a category, one or two categories that show—you see, the conflict-of-interest laws have no *de minimis* requirement. If you have one stock worth 10 cents or 1 million dollars' worth of stock, that is conflict of interest. And that is what we need to know. What do you own, in terms of conflicts of interests, to make judgments. Some of the judgments about—oh, is there a recusal necessary? Is there a waiver? They don't have to look into, OK, what does he own? How much is there? That is only in the event that you find that there is, in fact, a conflict of interest.

Senator COHEN. So, you think if I had one share of Capital Associates stock, or whatever it might be, that it would be enough to disclose that I held stock in this particular company, but not the amount?

Mr. MARTIN. That is right.

Senator COHEN. 20,000 shares, but if I had \$1 worth of stock would that be enough to satisfy you that a conflict exists?

Mr. MARTIN. I would want to know if you had that \$1 worth of stock.

Senator COHEN. And it wouldn't make any difference to you if I had 2 million dollars' worth of stock and were in a position of having some influence?

Mr. MARTIN. If you were the Secretary of Commerce, and you were dealing in that area, I would want to know if you had \$1 or more, but I could satisfy that through less than the number of categories that we now have. We have six or seven categories, and I don't feel that is necessary.

Senator COHEN. Why don't you go on. We will go into that in further detail. But the upshot of it is that you require less information for those now required to file public disclosure. You would modify that and have less information available, less detail, I should say, less detail required by those who are now required to comply with the disclosure laws, public disclosure.

Mr. MARTIN. That is my personal view.

Senator COHEN. I understand that.

Now second, with respect to confidential statements, you would have even less information than contained in the public disclosure?

Mr. MARTIN. Yes. As is the current test. That is exactly right.

As regards appearances, my personal view is that the standard to avoid appearances is a necessary and vital part of the Ethics Program. However, the term "appearance" or "appearance of impropriety" has been widely used, and in some cases been widely abused. It has become a catchall phrase.

Regarding its use in terms of whether or not there is a violation in the standards of conduct, I am personally reluctant to use the word "violation" without some solid evidence. In our office, frequently we are dealing prospectively, but in reviewing past activity, where only the appearance is involved, where delicate and complex matters are being reviewed, it is just too easy to use a label that may be turned into a headline that says "Violation."

We in the ethics area cannot settle for shorthand labels that avoid these very difficult judgments that must be made.

Certainly, where an appearance is concerned, there may be instances where corrective or disciplinary action is necessary. That to me is the most important point for an ethics official. What action did the Ethics Office recommend to take, corrective or disciplinary, not what shorthand label should be put on an act to characterize it? The problem, as I see it, is that there is a multiplicity of ethical standards and norms which are not uniformly applied. There is no focal point. Worse yet, the improprieties are triggered inconsistently through suspicion, innuendo, ignorance or mistake. Appearance plays an increasingly major role in ethics-related cases to the point where the distinction between evil and the appearance of evil are blurred. It would be my view that I would like to bring some consistency to the appearance of impropriety and avoid the use of shorthand labels.

Now as regards postemployment problems, that is title XVIII, section 207 and 208, negotiating for employment. In the regulatory agencies that we have audited, there are already regulations which require a person who negotiates for employment to notify the agency and to recuse himself from any activity in that regard. That is not uniformly true throughout the Federal Government, but we have consistently advised all agencies that we audit, that that ought to be the case, and in all our training and lecturing that we do, we take that position.

There are two prominent problems that I see in the postemployment area. One is the appearance of impropriety that is created when a high-ranking official, uniform or nonuniformed, who is administering or supervising a contract, changes sides and in short order goes over to represent or work for the contractor.

I think that is an appearance problem that is created, and the reason I think it is a problem is because that affects the public, and it affects the public in this way. It affects the public's view of the integrity of the procurement process in the Government. It is an appearance problem. I am not sure how you deal with it, but it certainly is an appearance problem.

The second area that I think is important is in the lower echelons of people who are administering contracts, the acquisitions officers, everybody involved in it, in, let's say, a large program, when two or three key people switch sides, as we have found in one instance, and go over and work for the contractor.

In that case, there is an effect on the morale of the other people who stay in the Federal Government, who stay on the contract. In fact, they feel that their fellow employees have sold out, and it does affect morale. I see that as two key problems in the postemployment area.

What are the solutions? I am not sure. We have certainly extensively lectured and trained on the need to recuse yourself when you are approached by a contractor or when there is some negotiation.

Mr. Chairman, those are the two things I think this committee ought to look at in terms of postemployment problems.

As regards the other areas that you indicated in your letter to me that you wanted me to testify about implementing our regula-

tions, we have clearly implemented all of the amendments that were passed in the 1983 act and they are now part of our regulations.

With that, Mr. Chairman, I'll be available to answer any questions you might have.

Senator COHEN. Thank you very much, Mr. Martin. If there is any confusion about my interpretation of your statements, perhaps I simply have misunderstood the nature of what you tried to accomplish.

I was looking at a document that you addressed to Senator Thurmond, for example, dated January 28, 1985, pertaining to the Meese nomination. In that letter you said that "the standards of conduct of the Executive Office of the President, which are aspirational in nature"—you go on to cite that. So you used that phrase "are aspirational in nature."¹

Then again, during the testimony in the Meese case, you said, "As you know, there is a rule in the executive branch regarding appearances, whose coverage is very broad. It provides that the employee avoid any action which might result in or create the appearance of a number of things, and let's call them an impropriety for now. Might result in and/or create the appearance. This rule is aspirational in nature."² So I'm simply quoting your words to the Judiciary Committee and your letter to Senator Thurmond.

And then, in dealing with the testimony over before the Armed Forces subcommittee, you're correct that it did deal with postemployment, but your statement leads me to a certain conclusion. You testified that, "I agree with much of the testimony of this subjective influence. I do believe it exists, but I don't know how to deal with it. I think you cannot make an appearance problem a violation of law. I think it's unenforceable."³

Those were the comments I was looking at in coming to these conclusions. In fact, your interpretation of the appearance standard is that it is aspirational in nature, and your view concerning what restriction can be placed upon postemployment services, such as employment with the private sector, is that it is unenforceable and cannot be made a violation of the law.

Now, with respect to your observation, I think you are perhaps the first of the OGE directors to use or employ the phrase "aspirational." You and I have had some private discussions about the source of that. I'm sure Senator Levin will go back and recall his moments of dealing with professor whomever who coined the phrase.

Mr. MARTIN. Fuller.

Senator COHEN. I'll leave that portion to Senator Levin when he arrives, but Mr. Wruble, who is going to be testifying after you, is going to testify that the appearance of conflict of interest does, in fact, or can violate the Executive order.

Mr. David Scott, who was the first chief counsel and the former Acting Director of OGE, has also given his views. I wrote a letter to

¹ See p. 148.

² See p. 149.

³ See p. 150.

him in March in which I asked him whether he agrees with your interpretation. The answer was:

No * * * Section 201(C) of the Executive order plainly equates an "appearance of a conflict of interest" with an actual conflict of interest. A violation of either would subject an executive branch employee to possible disciplinary action. The section of the Standards of Conduct which interpret 201(C) in the Executive order makes this point in a very straightforward manner by including "appearance problems" on an equal footing with other "Proscribed actions."¹

The question is whether there has been a change in the Executive order or any regulation pertaining to that, or simply a change in the interpretation made by you?

Mr. MARTIN. Let me answer your question. There has not been a change, obviously, in the Executive order although I am going to study it and maybe perhaps propose some by the end of the summer. It is my view that this standard does marry aspirational standards with regulatory standards and that it just has become too convenient to label an appearance problem a violation.

Senator COHEN. Why is it too hard to label it a violation? It certainly could pertain to the kind of recommendation you make. I mean, you draw distinctions every day. You were saying that there is evil and the appearance of evil and that they have become blurred. Well, we live in a pretty complicated world and sometimes you can have a very minor conflict of interest and a major appearance problem, and you'd be hard pressed to say that the actual conflict is more evil than the major appearance.

So don't you draw distinctions by saying, "Well, we have a minor conflict problem here and here is our recommendation for action toward this employee. And here we have a major appearance of impropriety problem and here is how we deal with this," rather than saying, "it's aspirational." And really we don't want to marry aspiration with actuality.

Mr. MARTIN. Maybe we're saying the same thing, Senator, because the way that we have viewed it traditionally, notwithstanding what Mr. Scott and Mr. Wruble may say, the way that the staff tells me they viewed it is it's kind of a sliding scale. When you get an appearance problem purely you kind of look at it and say, well, is it egregious or not. If it's not, maybe we'll recommend counseling. Maybe we won't even recommend counseling. Maybe there's some disciplinary action that the agency would take.

Senator COHEN. But you still could cite it as a violation of the Executive order.

Mr. MARTIN. I personally would not. I think there's a violation of the act when the agency takes action and it's upheld by the MSPB. I don't like to deal in those labels.

Senator COHEN. If it is only an appearance problem, then that will not be a violation of the Executive order in your judgment?

Mr. MARTIN. I don't view it as a strict violation. I wouldn't label it so. I think the important thing, Senator, is not what you call something but what action you might take to remedy the situation.

Most of the Ethics in Government Act and most of what we deal with is preventive in nature, trying to avoid appearances and trying to avoid conflicts of interest. I think it can be counterpro-

¹ See p. 141.

ductive where counseling is the only thing involved, let's say, in an appearance problem. That's what you want to accomplish. To label that as a violation, I think, is counterproductive and you'd get a headline.

Let's say you have an egregious act of an abusive office and you have an appearance problem. Let's say they occur on the same day, and if you label them both a violation, they would both be treated by the newspapers and by other organizations violation. And I don't care what what backfilling you might do to explain, gee, it was only an appearance problem, you're labeled with that.

Senator COHEN. The question I am asking you is whether the potential for an appearance problem can be greater than that of an actual conflict?

Mr. MARTIN. It could.

Senator COHEN. What you're doing is dismissing such action by saying, "It is only an appearance, don't call it a violation." What I'm saying is that it should be equated to the level of a violation. But we deal with it differently; we have a different remedy for a violation. But if you just say that the papers are going to print it as a violation of the law and that this man is condemned to damnation, unfortunately then you're changing the whole thrust of the law. I know, you've told me you had this opinion from the very day you took over; is that correct?

Mr. MARTIN. Not the very day but I had occasion to—someone requests that call something a violation and I didn't do it, and I guess I was excoriated for it.

Senator COHEN. I asked you once before how long you've held this view that the standard is aspirational. You said it was June 1983, when you were sworn in.

Mr. MARTIN. I don't know if it was that long but I've certainly had occasion to deal with these problems early on.

Senator COHEN. I have a copy now of an advisory letter which you wrote to an agency counsel on May 1, 1984, roughly a year after you took office.¹ In that letter you advised that a Government employee should not work on a contract when his wife was working on a retainer basis for the contractor, and you ruled that the employee must recuse himself from the contract because the husband-wife relationship created "such a high degree of appearance of impropriety" that the Government employee should not participate on that project when his wife was working on retainer. Why was the appearance of impropriety important enough to require recusal in that case if the standard was only aspirational?

Mr. MARTIN. First of all, I didn't say they were only aspirational but I think they are prospective and they're forward looking and certainly you want to avoid appearances and that's exactly what that letter was about. But you didn't see me label it a violation.

I think you'll find in all of my opinion letters that I don't call any of these appearance instances a violation. I call them maybe an intolerable appearance problem or an unacceptable appearance. Maybe we're talking about semantics, Senator, I'm not sure. I cer-

¹ See p. 155.

tainly think that prospective-looking advice is what the Office of Government Ethics is all about.

Senator COHEN. So in other words, if it's only an appearance problem, you don't want to cite it as a violation but you want to recommend action to take in light of the appearance.

Mr. MARTIN. Oh, I certainly think that action to take care of the appearance—I'll say again, if you're going to recommend counseling to somebody say, look, you have an appearance here; avoid it. I certainly would not—if someone called up and said, hey, did he violate the standards, I would say no. We counseled him to avoid this appearance.

Now—well, that's my answer.

Senator COHEN. Go ahead.

Mr. MARTIN. Let's suppose you did an egregious act. Let's suppose somebody's counsel—and I think that may be one of the cases that you have—somebody's counsel goes ahead. He or she goes ahead and goes against the advice of his ethics counselor on an appearance problem and combines that with, let's say, an abusive office. Disciplinary action might be appropriate in that case.

Senator COHEN. Why, if there's no violation?

Mr. MARTIN. I'm not saying that there is or is not a violation. I'm saying disciplinary action might be appropriate.

Senator COHEN. But why?

Mr. MARTIN. Because of the egregious nature of the acts. In other words, if you're an actor—

Senator COHEN. So if you have an appearance problem which doesn't amount to an egregious dimension, then you might not recommend any disciplinary action, but you would just let the appearance be described as being minor or insignificant.

Mr. MARTIN. I would describe it as an appearance problem.

Senator COHEN. The difficulty I have is that the language of the Executive order is pretty clear on its face, and it directs Federal employees to avoid not only actual conflicts of interest but also the appearance thereof. Then, the regulations implementing the Executive order state that employees "shall avoid any actions whether or not specifically prohibited which might result in or create the appearance of—". So the language is pretty clear.

Mr. MARTIN. Yes, it is. But it's very broad and it makes a very broad sweep. I guess maybe that's my problem.

Senator COHEN. Your predecessors had no difficulty in saying that's the law; that's what we're going to enforce.

Mr. MARTIN. You know, I've never read anything that my predecessors called a violation either.

Senator COHEN. Let me ask you—I assume that in reaching your decision about this metaphysical distinction we're drawing, that you consulted the case law; that you looked at cases.

Mr. MARTIN. I cited one case to you and Senator Levin, I think.

Senator COHEN. I assume you read cases or your counsel advised you on existing case law.

Mr. MARTIN. I was aware of one case that I so cited to Senator Levin. I'm aware of others since then.

Senator COHEN. As a matter of fact, you would not put yourself in the position of making a statement that certainly is provocative—perhaps correct, but certainly provocative—in coming to this

conclusion unless it had been thoroughly researched by your law office; is that a fair statement?

Mr. MARTIN. I have consulted with my staff on it, yes.

Senator COHEN. I assume your staff has reviewed case law dealing with Federal employees caught in conflict-of-interest issues.

Mr. MARTIN. That's correct.

Senator COHEN. Are you aware of any case law where the courts threw out disciplinary actions against employees because the workers had only created the appearance of conflict of interest?

Mr. MARTIN. I'm aware of no case in which the appearance was not accompanied by other egregious acts.

Senator COHEN. We've had a chance to review the relevant cases before the Federal courts and also the Merit Systems Protection Board, and they ruled that conduct resulting in the appearance of conflict of interest is adequate grounds for disciplinary action.

In 1982, the Merit Systems Protection Board upheld the suspension of a Government health care technician for 30 days because he cashed checks for an 84-year-old patient.¹ The Government found that the employee did not in any way benefit from these particular transactions, but they ruled that the conduct created the appearance of using his public office for private gain, thus violating agency regulations. Now, under your interpretation, there would be no violation.

Mr. MARTIN. That's correct. I haven't read the case.

Senator COHEN. Well, that's just one case. We've got other cases involving the Bureau of Indian Affairs which I'll talk about with some witnesses later.² But did you agree with the result in that case?

Mr. MARTIN. Well, I haven't read the case, Senator. I really can't tell you that I agree or disagree with it.

Senator COHEN. The only way you would disagree with it is if you use your interpretation that the appearance was not a violation.

Mr. MARTIN. Let me say, I would not label it up front a violation. If that matter were to come to me just on the facts you stated, I wouldn't label it a violation there. I might let the agency say, OK, you take whatever action you want to and I might advise them to.

Senator COHEN. What guidance is there for people in this business if they are going to be held to a kind of jurisprudential interpretation that you want to give it. It might be minor; it might be OK. How do they function under this situation where they don't know whether their actions are OK or are not OK? We'll leave it to Mr. Martin to decide whether the action is so egregious that it amounts to an impropriety, an appearance problem but not a violation. How do they function in that kind of a world without some pretty hard and set guidelines?

Mr. MARTIN. Senator, I don't think I've changed much. There's always been a balancing in my office as my staff has been describing.

Let me tell you, for instance, there was a view shared by some that whatever happens regardless of the facts—if something came

¹ See *Burnett v. U.S. Soldiers' and Airmen's Home*, 11 MSPB 413, 414 (1980) p. 160.

² See *Moffer v. Department of the Interior*, 8 MSPB 134 (1981) p. 156.

up in the paper that created an appearance—regardless of the facts behind it, that's a violation. However, if upon looking at it you kind of find that there was only an appearance and you kind of backed out of it and said, well, we don't think it's a violation. I mean, that's one position that some take.

Senator COHEN. Why couldn't you say that it is a technical violation but we think that under the circumstances, no disciplinary action is warranted?

Mr. MARTIN. I resent that label, violation. I really do. We're dealing—as you know, Senator—in a very sensitive, complex area. I just think it's too convenient to have a shorthand label for the media and others to label people as violating the standards of conduct. I think it's counterproductive.

Senator COHEN. Don't you think you ought to change the Executive order rather than just interpreting it to conform with what you think?

Mr. MARTIN. As you mentioned, I am taking a hard look at the Executive order but this is my interpretation. But I don't think anybody in the agency, the people I've been in contact with or my staff, are confused about what the standards are.

Senator COHEN. Do you think that the absence of any clear-cut statement that the appearance of conflict of interest is a violation of the Executive order could generate some sloppy habits on the part of Federal employees?

Mr. MARTIN. I don't think so, no.

Senator COHEN. You know, there's a popular song out called The Heat is On. What happens when the heat is off in your experience in dealing with people? When the heat is off, they tend to relax a little bit; don't they?

Mr. MARTIN. I don't think the heat is off, Senator; I really don't.

Senator COHEN. How have you advised the agency ethics officials to view the appearance problem?

Mr. MARTIN. I haven't done anything on that; I've changed nothing.

Senator COHEN. What do you advise them?

Mr. MARTIN. You mean now; presently? That if there's an appearance problem, that they need to look behind it to determine if there's anything to it, and use the balancing act that we've used from the commencement of the Office's existence.

Senator COHEN. Do you advise them that there's a violation or not a violation of the Executive order?

Mr. MARTIN. I don't talk in terms of violations.

Senator COHEN. Well, how do they function?

Mr. MARTIN. I don't think they function any differently from since I took the Office as Director.

Senator COHEN. Let me just tell you that some Federal employee unions have said they're going to raise your interpretation of the Executive order as a defense in disciplinary actions against Federal workers about the conduct that creates the appearance of impropriety. Do you think that defense is appropriate?

Mr. MARTIN. I think they should raise it but I don't know whether they'd be successful because most of the cases I've reviewed and looked at, the appearance is always accompanied by some egregious activity. So—

Senator COHEN. Do you think the signing of a check for an 84-year-old man is an egregious activity?

Mr. MARTIN. No; I don't think that's egregious.

Senator COHEN. They suspended that individual for a period of 30 days. That's a pretty serious suspension; isn't it?

Mr. MARTIN. As I say, I think it's an unfortunate case if that's the case. But let me say this, which I've said before, that such a—not varied but such a—broad standard certainly is subject to abuse.

Senator COHEN. Let me just say that I think your interpretation—without a clarification or a change coming from the President in the Executive order—has invited the Federal workers unions to raise this as a defense, and I think that is not going to be conducive in the future to reducing the appearance problems.

Mr. MARTIN. As I said, Senator, I am taking a hard look at this Executive order. This Executive order, if you know the history of it, was passed in 4 months in 1965. Like many of the things in the ethics area, I think it was not really—it was just bootstrapped on to past Executive orders dealing in the area.

I think the time has now come to take a hard look at it and see if we can sort out at least what I think has become the way we deal with these problems, to conform the Executive order to that system.

Senator COHEN. What you are contemplating, I take it, is that you want to recommend to the President to issue a new Executive order drawing the distinction between conflicts and the appearance of conflicts—

Mr. MARTIN. Yes; I do.

Senator COHEN [continuing]. And to delete the appearance of conflict as being a violation.

Mr. MARTIN. I am not necessarily sold on that.

Senator COHEN. But you are doing that?

Mr. MARTIN. I am going to do a thorough analysis when I get ample time. I already have in mind a person to do that for me, with me, and when I have completed that—

Senator COHEN. Isn't that going to be your recommendation?

Mr. MARTIN. I am not sure it is. I am leaning that way, I must say that.

Senator COHEN. I don't understand this. On the one hand, you have had these pretty solid convictions for at least 1 year, perhaps 2 years.

Mr. MARTIN. And they remain that way.

Senator COHEN. It has been your policy for the 2 years. You have indicated you would like to have a new Executive order to clear away the ambiguity. I think it is fair to say that you are going to recommend that the new Executive order drop the appearance of conflict as being a violation of the Executive order itself.

Mr. MARTIN. I am certainly leaning that way, but I would want to have the person who does the analysis for me have a free hand in recommending to me how to deal with that and what is the best way. I would not want to commit myself to that right now, but certainly those are my views.

Senator COHEN. Mr. Martin, as you know, one of the duties of the Director is to review the public financial disclosure statements of Presidential nominees requiring confirmation by the Senate and to

certify to the Senate that the nominee is free from conflicts of interest. If you had determined that the nominee had a possible conflict-of-interest problem, would you inform the Senate committee?

Mr. MARTIN. Possible conflict? Well, that is difficult to answer, Senator. We try to resolve those things before they ever get to the Senate committee, and if we do, then I don't feel it is necessary to advise a committee.

Senator COHEN. In other words, assuming you can resolve them, you don't feel there are any obligations to let the chairman of the committee, be it Judiciary or whatever committee, know that there was a potential problem here that you have satisfactorily resolved?

Mr. MARTIN. No, I don't feel it is necessary to do that.

Senator COHEN. Earlier, I mentioned David Scott, the former Chief Counsel and Acting Director of OGE, who has submitted written testimony. One of the questions I asked him was whether the OGE Director has an obligation to report to the Senate confirmation committees cases where he found possible violations of standards-of-conduct regulations.

He replied that it should be reported to the Senate committee members when it would enable them "to arrive at a more informed judgment, assessing the nominees' compliance in fact with all applicable laws and regulations concerning conflicts of interest." So I take it you disagree with that?

Mr. MARTIN. I don't think that we totally disagree on that. He qualified his answer there.

But Mr. Scott did work for me for a good time, and we had instances where things like that did occur, and I don't recall him ever insisting or telling me that it is essential that I tell a Senate committee of every possible conflict that I have resolved.

Senator COHEN. What if there are serious questions that you resolved satisfactorily? You don't think that would be an indication to call the chairman and say, "Listen, we have got a problem here; we think we have got the answer and we think we have got it resolved, but you ought to know about it?"

Mr. MARTIN. Sure, if it is serious enough, and it goes to the heart of—let's say the heart of the man's qualifications. Yes, I probably would do that. I would have no problem doing that.

Senator COHEN. Probably would do that, but there is no guarantee the committee would ever find out about it unless it were leaked to the press?

Mr. MARTIN. That is right. I try to keep things like that out of the press, as you know.

Senator COHEN. But what if the people who sit up here have a different interpretation of the Executive order than you do, that they would equate appearance with an actual violation, as the Executive order was written? Don't you see a problem if you sit in OGE as the chief enforcer of the Ethics Act, as such, and make decisions based upon your own personal determination as to whether or not appearance is equal to a violation or whether it is precatory language only, to use a lawyer's phrase, and you thus exclude the members from their constitutional confirmational duty from having any knowledge of those kinds of situations?

Mr. MARTIN. Senator, if I thought that the problem was something the Senate should consider and was a sufficient problem and

I had not been able to resolve it to my satisfaction, then I certainly would raise it.

Senator COHEN. In 1983, when we went through the reauthorization of the Ethics in Government Act, we adopted a number of amendments in which we tried to strengthen the Office itself. One of those amendments provided that you could call upon the inspector general's office of any agency to conduct an investigation.

I think what we did was recognize that you had a pretty small operation, with limited staff, and we didn't want that restriction encumbering your activities. I would like to know whether or not you have made any use of this new authority. Have you asked assistance from any of the inspectors general of any office concerning these conflicts?

Mr. MARTIN. In a particular investigation, no, I have not, but I have worked very closely with the inspectors general in terms of training and assistance. They utilize a number of our questions that we raise in their reviews and their audits. But in a particular case, no, I have not called upon the inspectors general.

Senator COHEN. In that legislation, we made some recommendations that you approve your training programs for employees in order to assure that political employees are fully aware of conflict of interest and other ethical requirements, and I think your office conducted a number of training programs for career employees during the past year.

I was wondering what you have done with respect to increasing the training for Presidentially appointed officials. They sort of come in from the cold world of business where the standards are quite different than what they are here, and they are shocked, many of them, suddenly to find themselves in the spotlight of interrogation—what they would call inquisition—for something that they had no idea was a violation of the law. What are you doing about informing or training Presidential nominees for office about strict requirements?

Mr. MARTIN. I have recommended through the PCIE that every agency conduct annual or semiannual training for all employees, as is done in a number of agencies. That includes the Presidential appointees as well.

In addition, I have encouraged the Cabinet Secretary, Mr. Craig Fuller, who is no longer there, to implement a 1- or 2-day refresher course for all Presidential appointees, let's say when they first come in, to gather 30 or 40 of them and spend a day on ethics matters and other things, budget, personnel, that might be encountered when they first arrive—for instance, like travel, gifts, honoraria, things like that.

That was in the works, and I was optimistic we would be doing that early this year, but Mr. Fuller had left, and I have got to reestablish my attempts to establish that program.

But there are a number of agencies that do conduct the training, and it is required training. The Department of Energy is very high on that.

Senator COHEN. Back in May of 1983, your office sought a delegation of authority from the President to issue regulations requiring that those confidential financial disclosure requirements be the same as the public disclosure requirements?

Mr. MARTIN. That is correct.

Senator COHEN. I take it, since May 1983 you have had a change of heart?

Mr. MARTIN. Well, no, I have never had a change of heart, but based on the Department of Justice's opinion, if you were to proceed administratively you had to require that. Their interpretation of the Ethics Act was such that if you were going to have a confidential system it had to be in the same form and require the same information as those who file publicly.

So we had no choice. We were implementing what Justice said we were required to.

Senator COHEN. The Justice Department said that the Ethics in Government Act nullified or invalidated the confidential financial disclosure system.

Mr. MARTIN. It says it superseded it, that is correct.

Senator COHEN. That was when, early in 1983, you were advised of that?

Mr. MARTIN. Yes, I think it was in the spring of 1983.

Senator COHEN. Why has it taken 2 years to correct the problem?

Mr. MARTIN. When I came into office, that was one of the problems presented me in June of 1983, and I immediately sought to determine what we can do about it, either administratively or through legislation.

I convened a number of meetings with department heads—not department heads—general counsel and with OMB officials, and the departments were of the view—and I share that to a certain extent—that maybe we could get Justice to modify its views if we were to go back with an expanded argument, not only legalistic but policywise. So I did that. That was—I think I forwarded a memorandum back to Justice in the fall of—no, it was later than that—the fall or early winter of 1983.

Justice came back to me in June 1984 and said, sorry, we adhere to our original opinion, but there are certain things you might be able to do in lieu of a confidential system, like require certifications that we don't have any conflicts of interest by employees or certain things like that.

So using those kind of things, I tried to accommodate administratively what we wanted to do to preserve some reporting system. But I found that I just couldn't accommodate and do it and still ensure that we would have a good system, free of conflicts of interest, for Federal employees, a reporting system.

So I then decided legislation was the better route to go.

Senator COHEN. But what you are advocating now is that you should have less information, rather than more, on the confidential disclosure requirements?

Mr. MARTIN. Less than would be required by those who file publicly, yes.

Senator COHEN. Have you ever had any problem with confidential statements being leaked to the press or disclosed? Has that been a problem?

Mr. MARTIN. No. There was a lawsuit about it, but, no, I haven't had any problem. Senator, I have had no one—even the public filers—I have had no one request a career employee's public filings. They only request political appointees.

So I think there is no interest in reviewing the confidential reports.

Senator COHEN. Then why is there a reluctance, I am told there is, on the part of those people who would be at the mid-level of employment or advisory status to comply with these disclosure requirements? Why is that if they are going to remain confidential?

Mr. MARTIN. I am sorry, Senator?

Senator COHEN. I am told there has been a reluctance on the part of some who would either operate in an advisory capacity or some advisory position—a reluctance to file these disclosure requirements, even though they would remain confidential.

The first question: Has there been a problem with a loss of that confidentiality? You say no?

Mr. MARTIN. I am not aware of any.

Senator COHEN. So, why is there a reluctance to file the disclosure requirements?

Mr. MARTIN. I didn't know there was.

Senator COHEN. It doesn't present a great, burdensome problem, in your judgment?

Mr. MARTIN. To file a confidential statement in its abbreviated form? No, it does not.

And my view is if you required those people who sit on boards and technical people who are not full-time employees, to have them file what the people who file publicly, I think you would have a loss of their services. I think they would not file.

Senator COHEN. Have you had any indication that would be the case?

Mr. MARTIN. I have from the agencies and departments. I have, indeed. That was the problem in the hiatus between the 1983 decision of the Department of Justice and the 1984 decision. That was when we first requested a new Executive order requiring that filing. That was the complaint that the departments and agencies came back to me with.

Senator COHEN. So the confidentiality is not a problem. They just don't want to file the form; because they don't want the burden of filing it?

Mr. MARTIN. They don't want the burden of filing what would be required of public filers.

Senator COHEN. But it has nothing to do with the confidentiality or lack of it?

Mr. MARTIN. I don't think it does.

Senator COHEN. I will tell you one of the problems we have—at least that I have—in terms of your struggle to interpret the distinction between appearances, even though the letter of the Executive order is quite clear.

We now have a similar problem with the Department of Justice. We passed a law called the Competition in Contracting Act, and the President signed it into law. And then, the Department of Justice said, "We don't think that a particular provision of the act is constitutional, and we are sending out a memo to all of our agencies dealing with contractors, telling them not to pay any attention to it."

That, to me, is one of the most flagrant displays of arrogance I can think of. If you don't like the law, don't sign it. If you don't

think it is constitutional, don't sign it. But don't pass a law and give it the stamp of approval by the President, and then say that these provisions are constitutionally violative. To me, it really fits into a pattern of what we are seeing. If we don't like it, just don't obey it. If we don't like it, come up with a different rationale.

What you have got to do, it seems to me, if you have a system of laws, is either pass the law or reject the law; either enforce it or you are going to violate it.

But we can't have, I think, these individual ad hoc interpretations of what Congress has done or hasn't done because it does, in fact, create a morass of difficulties for us, as well as for you.

I have more questions I would like to ask you, but I am going to defer for the moment to Senator Levin so he may pose any questions he might have.

Senator LEVIN. Thank you, Mr. Chairman.

I am very much troubled by the way in which you have not applied the Executive order. I think you have given it an interpretation which nobody else in Government has given it, and thereby taken the law into your own hands and created a double standard—some employees of the executive branch vis-a-vis other employees who are governed by the Merit Systems Protection Board rulings. I am deeply troubled by it.

I think that your interpretation has created a real serious problem for morale, and has created a problem in terms of the credibility of our ethical standards. We now have two sets of standards. We have the opinions of the Merit Systems Protection Board, which I gather you are familiar with, which say if you create the appearance of a conflict of interest you are violating the law. That is what the law says.

You are saying that if you create the appearance of a conflict of interest you are not violating the law.

You have not sought to change the law. You have not asked for a change in the Executive order. You are taking that under review. You are studying that. You may do it this fall, or you will do it this fall—whatever your intentions are. But you haven't done it yet.

In the meantime, the Executive order, I think, is the law, not you.

Frankly, I am very much troubled by your taking the law into your own hands, which is what I think you have done, thereby creating a double standard for different employees in the executive branch; how they are being treated if it is a HUD employee compared to how they would be treated if they are a HUD Assistant Secretary.

Have you talked to Fielding about your request for the amendment of the Executive order?

Mr. MARTIN. In general, yes, I have discussed that, not in detail.

Senator LEVIN. Do you have commitments from him to recommend changes in the Executive order?

Mr. MARTIN. I do not.

Senator LEVIN. You told him you are going to be recommending changes?

Mr. MARTIN. I said I am going to review it, and I would like to change it.

Senator LEVIN. Have you told them how?

Mr. MARTIN. No.

Senator LEVIN. Do you know how you're going to change it?

Mr. MARTIN. I'm not sure—as I explained to Senator Cohen earlier—I think I'm going to have some time and staff starting next month, as a matter of fact, to take a hard look at it, and to make some recommendations.

Senator LEVIN. You mean you haven't taken a hard look at it yet?

Mr. MARTIN. I have with my staff. We've been very busy this early winter and spring in this agency and I have a small staff, as you know. I have looked at it and I think I have some ideas. But I have retained someone who has extensive experience with the entire history of ethics in the United States starting from day one. I've retained this person on a part-time basis this summer to advise me on what he would recommend. I'm not saying I'll adopt it or I won't. But I think our views—I've had a couple of interviews with him and I think our views are compatible.

Senator LEVIN. You do know, though, that you're going to make recommended changes.

Mr. MARTIN. I want to.

Senator LEVIN. You're going to come up with recommendations.

Mr. MARTIN. I want to.

Senator LEVIN. Who's going to stop you?

Mr. MARTIN. I want to.

Senator LEVIN. So you intend to. That's similar to you're going to unless you're dissuaded by something that happens between now and then; is that a fair summation? In other words, it's your present intention to make recommendations for change?

Mr. MARTIN. Yes.

Senator LEVIN. Unless your newly contracted adviser talks you out of it or something else. OK.

Why do you want to change the Executive order?

Mr. MARTIN. I think it's too broad a sweep. I don't like the language. I don't like the language which might result in "create the appearance of" and I think there are some other sections.

Senator LEVIN. You don't like the language?

Mr. MARTIN. I don't.

Senator LEVIN. What makes you think you have a right to strike it out with your pen?

Mr. MARTIN. I think there's still an appearance standard. I think the appearance standard is an essential part of this Ethics Program, as I said earlier, to Senator Cohen.

Senator LEVIN. It's not a violation?

Mr. MARTIN. I don't like the label violation.

Senator LEVIN. You don't like it but is it or isn't it a violation of the Executive order?

Mr. MARTIN. In my view, it's not.

Senator LEVIN. So why do you want to change the Executive order if it's not a violation?

Mr. MARTIN. I want to change the order to comport—I think of how we view appearance problems in the Government now.

Senator LEVIN. You don't mean the Government; you mean your office?

Mr. MARTIN. That's right.

Senator LEVIN. Because the other parts of the Government are handing down rulings firing employees for creating appearances.

Mr. MARTIN. When you get a ruling from the MSPB, I think you can fairly say it's a violation. But I don't put the labels on that. I don't want my office in that business.

Senator LEVIN. But if it comes down to it, you just don't like the Executive order.

Mr. MARTIN. I don't like certain parts of it.

Senator LEVIN. Well, I would suggest that you live with it; you live by it and implement it until it's changed, and that's what you're not doing.

Mr. MARTIN. Senator, I think I'm implementing it.

Senator LEVIN. If you're implementing it, you don't need to change it.

Mr. MARTIN. OK.

Senator LEVIN. That's the problem. You said you don't like it and you want to change it but you're implementing it in a way which you're comfortable with.

Mr. MARTIN. We are not avoiding dealing with appearance problems, if that's what your concern is.

Senator LEVIN. No. Are you comfortable with the way you're implementing that order?

Mr. MARTIN. Yes, I am.

Senator LEVIN. You're comfortable with the way you're implementing it; you say you're implementing it legally; you want to change it.

Mr. MARTIN. Yes.

Senator LEVIN. You don't see any inconsistency in that?

Mr. MARTIN. No. It's certainly my view that the Executive order needs some amendments and it certainly needs to be looked at.

Senator LEVIN. Then it's clear it's your view.

Mr. MARTIN. It's counterproductive in dealing with an appearance problem only to label that a violation especially from my office. When you're dealing with a delicate, complex problem and people's reputations, I don't want to engage in it. It's too simple a shorthand method of removing thinking from the process that we deal with, and there's always been a balancing process in the office.

Senator LEVIN. I understand your anguish. Let me tell you, I understand the anguish of lots of Federal employees who are judged by a different standard than the one you're talking about. There's plenty of anguish there, too, having lost their jobs and been suspended and listening to you say that appearance of conflict of interest isn't a violation.

They'll say, why was I fired from my job at the Soldiers' Home or suspended for 30 days or fired from the Indian Affairs Bureau? Where was Martin when I needed him? What the hell is going on in the Federal Government if someone loses their job at an Indian Bureau because appearance of a violation of conduct of interest, where the agency says, we can't tell for sure that there was one? The evidence isn't absolutely clear one way or the other but, by God, there was an appearance of conflict and he should have known it. The law says you cannot create the appearance of a conflict of interest and the guy loses his job.

Mr. MARTIN. I'm not aware of anybody losing his job where an appearance wasn't accompanied by an egregious act also.

Senator LEVIN. No, but the appearance is what was the basis for the firing. Let's get right down to it. The appearance of conflict was the basis for losing the job.

Mr. MARTIN. I'm not aware of that.

Senator LEVIN. Well, are you familiar with the *Burnett* case? That's the *Soldiers' Home* case. Are you familiar with the *Moffer* case versus Department of the Interior?

Mr. MARTIN. No, I'm not.

Senator LEVIN. I'll get you a copy of that; you may want to comment on that about somebody who, with his wife, purchased some land from an Indian. The Bureau of Indian Affairs and, finally, the Merit System Protection Board sustained his dismissal for doing that based on an appearance standard.

Mr. MARTIN. Well, I will say to you when I first approached this area, my staff advised me that they were unaware of any cases involving purely appearance problems where somebody was dismissed or disciplined severely but I'm not saying—

Senator LEVIN. How about 30 days; is that serious?

Mr. MARTIN. Yes.

Senator LEVIN. You are familiar, you told Senator Cohen, with the *Burnett* case, the *Soldiers' Home* case?

Mr. MARTIN. No.

Senator LEVIN. Oh, you weren't familiar with that. I'm sorry.

Mr. MARTIN. But I'm saying that an egregious act could not be—I mean, to me—

Senator LEVIN. An egregious appearance?

Mr. MARTIN. Yes.

Senator LEVIN. Without an actual conflict?

Mr. MARTIN. Could not be—some form of corrective action could be applied? Sure, I think that's possible.

Senator LEVIN. Let me put it this way. Do you think an egregious appearance without an actual conflict is a violation?

Mr. MARTIN. It might be if you go to the Merit System Protection Board, sure.

Senator LEVIN. No, in your point of view—

Mr. MARTIN. I don't label things like that a violation.

Senator LEVIN. It's a hell of a Government we're running. We've got two different systems of justice in this Government right now.

Mr. MARTIN. I don't share that view, Senator.

Senator LEVIN. You said in front of the Merit Protection Board it will be but you don't consider it.

Mr. MARTIN. I don't label it in my office and I don't want to.

Senator LEVIN. You don't label it a violation, therefore, you don't correct it.

Mr. MARTIN. I don't say that I wouldn't recommend some corrective action or counseling.

Senator LEVIN. How about discipline, suspension, firing?

Mr. MARTIN. That would be an agency decision.

Senator LEVIN. Would you recommend discipline?

Mr. MARTIN. I might.

Senator LEVIN. For a nonviolation?

Mr. MARTIN. Yes.

Senator LEVIN. For a nonviolation you suspend people?

Mr. MARTIN. I might. Let's suppose—as I said to Senator Cohen earlier—suppose you might create an appearance if you take such-and-such an act and the person says, well, I'm going to do it anyway. The agency might say, look, we're not going to just give you a letter saying you shouldn't have done it; we're going to slap you on the wrist now and do something about it.

Senator LEVIN. That's countervailing a direct order. That's not my question. My question was, if there was an egregious appearance without an actual conflict, do you think somebody, you, might recommend discipline. Your answer is "yes" and I said even though there's no violation, and you said "yes." What kind of Government of laws is that? You don't violate the law, you're disciplined.

Mr. MARTIN. Senator, I don't think this is something you ought to talk of in terms of violations where we're dealing with appearances.

Senator LEVIN. Obviously, I think you're going to have to live with the law and get it out and get it changed. If you get it changed—a big if—if you get it changed. But I think your refusal to comply with the clear wording of that Executive order is, in and of itself, a violation of the law. And I think that's what you're now doing and it's very, very serious because there's a double standard.

It would be bad enough if everybody were being judged by the wrong standard, assuming that the Executive order is as clear as it seems to be. But everyone isn't being judged by the same standard. You're judging or recommending that people be judged at the various agencies, certain people at certain levels be judged by a certain standard. And the Protection Board is judging people by another standard, all working for the taxpayers, being judged by different standards.

I'll tell you, there's an equal protection case—that is just, you know, thinking out loud here—we are sitting ducks for an equal protection case. If that person working at the Soldiers' Home, if that person working at the Indian Affairs Bureau, and a number of other people who were being judged by one standard, could hear your testimony today and could have had it in time to go to court, there would be another issue here in this case and that is whether or not Federal employees are being judged by the same standard. As American citizens, they have a right to be.

I would suggest you get together with Fielding and that you do it promptly and you get the act of this Government together on one train. It either is or it isn't.

By the way, I think it clearly is. I don't think there's any doubt in that Executive order. That doesn't mean that the remedy for the violation is the same. Obviously, remedies are going to vary depending on facts, depending upon whether you think there really was a conflict or whether or not there was an appearance without a real one.

Remedies are going to change to fit the circumstances and the circumstances vary and you should be troubled by a situation where there's an appearance of conflict, but you can't prove a conflict. Of course, we should be troubled and it ought to affect the remedy.

But, my gosh, don't say it's not a violation when you read an Executive order which says it is a violation. That's the one thing you shouldn't do. Treat people based on circumstances, on the conditions, on the offense, on the circumstances. Deal justly according to the offense of what happened but don't read an Executive order and say it doesn't mean what it says and expect that the ethics laws of this Government are going to have any credibility among the people.

So, I'm deeply troubled by it. I think we have other witnesses this morning who maybe can shed some light on where we're going to go from here. I hope Mr. Fielding can, perhaps, give us a statement at some point on this because there is a serious problem.

I want to commend the chairman, as always, for having his finger on some very critical ethical issues in Government. He does that without fear of partisanship regardless of who's the administration in power, and I commend the Chair for his willingness to grapple with issues wherever the chips may happen to fall.

Senator COHEN. Thank you very much.

Mr. Martin, I think what Senator Levin is saying is that the Code of Hammurabi was pretty harsh. Nonetheless, it was enforced until it was changed.

What Senator Levin is suggesting, and I agree with him, is that it would be far better to have an equal application of a tough law which may create some real inequities and unfairness, to create pressure to change that law, rather than having you decide on an individual basis that you don't think the law is fair. Therefore you interpret it a little bit differently to soften the impact on the problems so that it will not taint everybody who may have only an appearance problem. That's the major problem we have.

Mr. MARTIN. I take your comments as well founded, Senator.

Senator COHEN. Has any agency indicated to you that OGE will not collect confidential statements?

Mr. MARTIN. That we will not or they will not?

Senator COHEN. They will not?

Mr. MARTIN. Yes.

Senator COHEN. Which agencies?

Mr. MARTIN. The Department of Justice.

Senator COHEN. That's wonderful. The Department of Justice has informed this subcommittee that it is no longer collecting confidential financial statements from its employees. Do you think attorneys from the Department of Justice should be required to file financial disclosure statements?

Mr. MARTIN. Confidential? Yes. I would prefer to see them continue to do it.

Senator COHEN. But they're not doing it.

Mr. MARTIN. That's what I'm told.

Senator COHEN. How can the Department detect conflicts of interest if the attorneys aren't required to file disclosure statements?

Mr. MARTIN. Unless the attorneys are advised that they'd better do it, they won't know it from any review, independent review.

Senator COHEN. But they're not advised. As a matter of fact, the Justice Department said that they are not even collecting them anymore.

Mr. MARTIN. I know that but unless an attorney were to be prosecuting a case or representing the Government in a civil matter and he were to have an interest, he would then have to notify and recuse himself as you might do anyway. You wouldn't know it if you didn't have anything to review. You wouldn't know the answer independently of the attorney coming in and telling you.

Senator COHEN. If you don't have the financial disclosure statement on file, you've really precluded the opportunity to find out whether there is a conflict.

Mr. MARTIN. By an independent review; that's correct.

Senator COHEN. And that is what is taking place within our own Justice Department?

Mr. MARTIN. As I understand, that's correct.

Senator COHEN. In a response to a survey that was taken by Common Cause, the agency ethics officials very frequently identified post-employment issues as the biggest ethics problem they face. In your statement, which has been included in the record, you have said that you have not found that agencies have difficulty with post-employment laws and regulations.

Mr. MARTIN. We have not found that they have complained to us that there is a problem. I don't think the agencies know the extent of the problem and we don't know the extent of the problem.

Unless—it's like we were talking about earlier. Unless you are caught redhanded in the act of negotiating for employment, you don't trigger section 208. Section 208 can be triggered by unilateral action but it's a very difficult statute to enforce and you would have to commit, I think, a great amount of your efforts towards determining who is negotiating for employment.

The section 207 problem, of course as you know, is representational activity. There's no general enforcement of that. The only way that is enforced is if someone who does leave an agency and is under the prohibitions that are in the section 207 and comes back with new representational activity.

Senator COHEN. It happens every day.

Mr. MARTIN. Well, it's not reported to the agency ethics official or to me if it does happen every day.

Senator COHEN. What recommendations would you have to deal with the conflicts-of-interest problems when somebody leaves, let's say, the Defense Department? I think you want to recommend a change in that, and we ought to apply it to NASA, perhaps the Commerce Department, and perhaps to all the agencies in terms of their post-employment regulations. But what recommendations do you make to improve the agencies' mechanisms for detecting and preventing these types of conflicts of interest?

Mr. MARTIN. I think Senator Levin's bill, which I've reviewed a synopsis of, would certainly assist in that. There would be a reporting and notice requirement and recusal. It would certainly assist.

But I don't know, short of a flat prohibition on switching sides for a certain period of time. I don't know how you can prevent the appearance problem.

For instance, if you were to say, OK, anybody who gets a job offer must then notify *x* official and recuse himself. That can happen 1 week before you leave or 2 weeks before you leave, or a month, and you still have that appearance. The top guys switched

sides in the middle. So without a flat prohibition, I don't know how you do that.

The thing to have to decide is, is the appearance problem—which I believe affects the integrity or at least affects the confidence of people generally in the procurement process—when that happens, is that serious enough that you would want to prohibit switching sides for a period of time?

Frankly, I don't know the answer to that. I don't have the wherewithal to determine that. I do know it's a problem. I do know it affects morale, but I don't know if you can prevent the appearance problem outside of an outright prohibition on switching sides.

Senator COHEN. You mentioned Senator Levin's amendment to the Department of Defense authorization bill. It's going to be coming up on the floor fairly soon and it requires extensive reporting by former DOD and military personnel who go to work for Government contractors. Do you think this more extensive reporting is going to make it easier to identify post-employment violations?

Mr. MARTIN. Yes, I do, and I think it will make the average employee who deals in the procurement process more acutely aware of his obligations and of the law.

Senator COHEN. Do you feel we ought to extend this beyond DOD?

Mr. MARTIN. I do. I don't think it is just DOD. DOD is the great procurer of goods for the Federal Government, but there certainly are a lot more people involved.

Senator COHEN. What about the review of the financial disclosure forms that go before the ethics officers? Do you know whether or not they go beneath the form itself or do they simply say that, based on their review of the forms, 99 percent of these people or 100 percent, don't have conflicts of interest, as best they can determine?

Was there any indication that some of the agencies go beneath the forms and actually conduct a reconciliation between the statement and the actuality?

Mr. MARTIN. Yes, where there was some problem, some problem arises, yes, they did. We in our training sessions are viewing the public files, we make that recommendation that you do go behind it. But as you know, Senator, there has been, I think it is true that the agencies just do not commit the manpower to that review that I would like to see or that I am sure you would like to see, and it is like for me to say commit more people.

We are working on a string. It is an agency review. And we can exhort and request and plead, but when an agency has a substantive mission it wants to accomplish, the ethics program will get the short shrift.

Senator COHEN. As a matter of fact, we are going to have some testimony later this morning to indicate that, notwithstanding the requirements for filing disclosure statements, many—a great percentage—are not filed for almost a year after these individuals come into Government service. I find that to be an outrageous situation that they are not actually reviewed for conflict of interest for a period of a year.

Mr. MARTIN. Is that the confidential statement, Senator?

Senator COHEN. Public and confidential.

Mr. MARTIN. Not to review the public for a year, I would find that disturbing. We may have found it. I will have to ask my agency monitoring chief, if that is true.

Senator COHEN. Just one final question. You testified before the Procurement Subcommittee——

Mr. MARTIN. I am sorry. I was asking if it was true. It was true.

Senator COHEN. Don't you find that shocking?

Mr. MARTIN. Yes.

Senator COHEN. Eleven months, twelve months?

Mr. MARTIN. I don't know the details of it, but if it's one form, I find it.

Senator COHEN. Aren't the standards set by the administration? If they say, "Let everything else go, the last people we deal with on this issue are the folks involved in ethics." Shouldn't that be the first thing they deal with?

Mr. MARTIN. Except by the agency head, I think, Senator.

Senator COHEN. The agency head is responsible to the top man. Couldn't that word come forth from the top saying that we are going to shape up this Government? We are going to insist upon high standards? We want the forms in. We want them reviewed before you take your Government paycheck.

Mr. MARTIN. Senator, I have to say that Mr. Fielding's office and others in the administration have taken a keen interest in assuring——

Senator COHEN. When?

Mr. MARTIN. We work very closely with Mr. Fielding's office.

Senator COHEN. It is always when you have a public hearing and Senator Levin and myself come in——

Mr. MARTIN. It is on a daily basis with the appointees, reviewing their backgrounds and their statements. It is a close working relationship, and that has existed with the Counsel's office. There is a thorough review on the way in. I am talking about the public filers. If they are not reviewed for 11 months, in other words, until the first annual review, I am distressed about that.

Senator COHEN. One final comment. I think you appeared before the Senate Armed Services Procurement Subcommittee back in March. You said the following about the postemployment laws:

We staff our positions with temporary in-and-out appointees. We contract out big Government jobs—and then must find liaison men to brief both sides. We have deliberately constructed institutions of dual, or blinded loyalties, and must be prepared to live with potential conflict-of-interest consequences.¹

Is that what you believe? You have resigned yourself that we've got a system where we have to live with these conflicts of interests?

Mr. MARTIN. Yes. I think we have to live with the potential problems, because——

Senator COHEN. Why live with it? Why not take more stringent measures, as are suggested by Senator Levin, and military agencies?

Mr. MARTIN. Well, you can. You certainly can.

¹ See p. 150.

Senator COHEN. Why not take the initiative and say, "Look, we think there is a potential duality in our lives that creates conflict-of-interest consequences. We don't like it. Here is how we are going to change it," rather than resign yourself to living with the conflicts?

Mr. MARTIN. We've resigned ourselves to a constant review process, but if you are going to have experts jumping back and forth from the Government, if you think that there is some salutary effects that will come from using the expertise of people on both sides, if you believe, as has been done in the past, that this expertise is valuable and assists both the Government and private industry in administering Government contracts, and using the expertise, I think you have to accept these potential things. If you want to eliminate that, you can, but that is a judgment I don't think I can make.

Senator COHEN. You certainly could be instrumental in making recommendations, but you don't appear to have the desire to make those kinds of recommendations to eliminate or deal with the post-employment situation.

Mr. MARTIN. As to the prevention of an appearance, yes, I am prepared to say, if you want to, you can prevent the appearance, but you have to paint with a broad brush, and I am not sure—I don't know the extent of the problem. If you want to paint with a broad brush, you certainly can.

Senator COHEN. We have been making this decision for years now. We say that we are in a game of choices here. On the one hand, we want the private sector expertise to come into the Government. We want that. We know there are risks involved in that as well. So we set up certain guidelines and standards, and we balance that. You can hear it time after time. Senator Levin and I have heard that we are losing people from public service, and we are. We have made a conscious decision saying, "OK, we will lose some good people, but there are a lot of good people who come in spite of those restrictions, because they want to engage in public service," and we say we are prepared to lose some good people in order to set a standard as high as we possibly can to ensure that kind of public support for the institutions which make our society free.

I don't think we ought to just resign ourselves and say, "Well, we'll create problems, and we may lose some good people." We have to set the standards and say we're going to do this, and we'll lift up the standards, if necessary, even through harsh measures. But I don't see that kind of leadership coming from the executive branch, and I don't know why it has to come from us. Why not kind of work together and say, "We've got a problem here. Here's how we think, from our perspective, we ought to deal with this." I don't see it happening.

Mr. MARTIN. Senator, I am certainly prepared to commit myself to work with your staff, with you and Senator Levin, on resolving a solution to the appearance problem, but I think you have got to recognize that there may be these repercussions on an outright prohibition. You have got to be willing to accept it, and the executive branch has got to be willing to accept it.

Senator COHEN. Assuming Congress says we are willing to accept that, assuming the Executive order says we are willing to accept that, don't you think you should accept that?

Mr. MARTIN. Absolutely. And I am certainly willing to and want to resolve this. I really think it is a huge problem, especially as it affects the confidence of the public in the procurement process.

Senator COHEN. I am not seeing the flood tides run to a drought in terms of people wanting to come to Washington and work in the Government. I have not seen any absence of qualified people. We may lose good people, but an awful lot of good people still want to come.

Mr. MARTIN. But at the other levels, at lower levels, not at the Executive levels, but I think at the coming in level, you may lose people who may otherwise come to work for the Government.

Senator COHEN. We know that. We may lose some. We know we are going to lose them. We said we'd rather have a higher standard than those who don't want to be up to that standard. They don't want to file the disclosures. They don't want to be bothered. We'd rather take our chances with a higher standard than dropping the standard to accommodate them.

Mr. MARTIN. That certainly can be done.

Senator COHEN. But you don't recommend it?

Mr. MARTIN. Well, I am not sure, Senator.

Senator COHEN. We have had you on the table long enough. Thank you very much. Certainly, it is illuminating, if not enlightening.

[Mr. Martin's prepared statement follows:]

STATEMENT OF

DAVID H. MARTIN
DIRECTOR
OFFICE OF GOVERNMENT ETHICS

BEFORE
THE SUBCOMMITTEE ON OVERSIGHT OF
GOVERNMENT MANAGEMENT
OF
THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

ON

OVERSIGHT ON THE OFFICE OF GOVERNMENT ETHICS

APRIL 2, 1985

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I appreciate the invitation to appear before this Subcommittee to present the views of the Office of Government Ethics (OGE) on the performance of its duties under Title IV of the Ethics in Government Act of 1978 (the Act). In addition to giving our views on the performance of the Office, I will address a number of specific issues which were raised in Chairman Cohen's letter inviting me to testify. These issues were OGE's interpretation of E.O. 11222 in cases involving the appearance of a conflict of interest; actions that the OGE has taken to implement the provisions of P.L. 98-150; the current status of the confidential financial disclosure system for Executive Branch Officials; and OGE's views regarding enforcement of the post-employment conflict of interest provisions contained in Title V of the Act and the implementing regulations.

Since the passage of the Ethics in Government Act on October 26, 1978, OGE has been charged with the responsibility of providing overall direction of Executive Branch policies related to preventing conflicts of interest. In 1983, when this Office testified before this Subcommittee in support of S. 461, legislation to extend the appropriation authority for OGE, the functions of the Office were explained in detail. Since that time, no major structural or organizational changes have taken place within the Office. The budget and staffing levels of OGE for fiscal years 1984 through 1986 are reflected as follows:

	<u>BUDGET LEVEL*</u>	<u>STAFF LEVEL</u>
FY 1984	1049	21.4
FY 1985	1158	23
FY 1986	1142	23

The figures for FY 1984 represent actual year ending levels; those for FY 85 and FY 86 are perforce tentative.

*The budget level figures are expressed in the thousands of dollars.

The work of this Office, including its responsibilities for Executive Branch personnel financial disclosure requirements, revolving door or post employment conflicts of interest, all other criminal conflict of interest statutes, and Executive Branch employee standards of conduct regulations, continue to be divided between the Chief Counsel and his staff of attorneys, and the Monitoring and Compliance Division staff of nine management analysts.

In calendar years 1984 and 1985, the Monitoring and Compliance Staff conducted reviews in 22 departments and agencies and in 7 regional offices.

From January 1984 to date, 762 annual, 221 nominee and new entrant, and 151 termination public financial disclosure reports (SF 278) were reviewed by the Office pursuant to the public disclosure provisions of Title II of the Ethics in Government Act.

We continue to stress the educational and training responsibilities of Title IV. From January 1984 to date, OGE has conducted 11 regional training sessions and 13 days of training here in Washington. Upon request, we have participated in more than 30 training courses sponsored by individual agencies. OGE continues to sponsor its annual training conference for agency ethics personnel, attendance for which in 1984 exceeded two hundred participants. In addition, effective May 1984, we began publishing a quarterly newsletter, a useful vehicle for disseminating timely ethics news and information about current legal issues, agency ethics reviews, training, financial disclosure and other matters of general interest to the ethics community.

Pursuant to the regulations implementing Titles II, IV and V of the Ethics Act, the staff continues to render formal and informal advisory opinions and to respond to numerous telephone inquiries from agency officials, individual employees, private companies or firms and the press on a variety of ethics issues and concerns. A digest of selected OGE opinions is annually made available to agency ethics officials to aid them in the administration of their ethics programs. Fully indexed copies of the complete opinions are available in our library.

EXECUTIVE ORDER 11222

Executive Order 11222 states that employees are to avoid any action, whether or not specifically prohibited by the Order's provisions on gifts, which might result in, or create the appearance of -

- (1) using public office for private gain;
- (2) giving preferential treatment to any organization or person;
- (3) impeding government efficiency or economy;
- (4) losing complete independence or impartiality of action;
- (5) making a government decision outside of official channels; or
- (6) affecting adversely the confidence of the public in the integrity of the Government.

The language shall " . . . avoid any action . . . which might result in or create the appearance . . ." has created certain difficulties of interpretation and enforcement due to the apparently subjective nature of the standards.

The Office of Government Ethics believes that the intent of the "appearance standard", as stated in Executive Order No. 11222, is to require all executive branch government employees to make every effort to avoid any action or situation which might result in the public perception that the government employee had abused one of the Executive Order's six standards. Clearly, this is an aspirational standard which is often difficult to apply in practice. Additionally, an appearance problem can be created through ignorance or inadvertence or due to circumstances which are unforeseen or beyond an individual's ability to control.

The proper remedy in any given situation may be difficult to determine since it is hard to assess retroactively whether an appearance of conflict was predictable or avoidable under the circumstances. In any event, any remedial action taken by an agency must meet any requirement imposed by statute, regulation, or Executive order.

PUBLIC LAW 98-150

The Office issued interim regulations in 1984 and final regulations in January 1985 conforming existing regulations to changes made to Titles II and IV of the Ethics Act by Pub. L. 98-150 of November 11, 1983. These regulatory amendments described the important changes made by Pub. L. 98-150 and identified areas of specific change as they relate to public financial disclosure or enforcement of agency procedures. The financial disclosure form (SF 278) is currently being updated to enhance its usefulness.

More particularly, our amended regulations reflect the change in the relationship between the Office of Personnel Management (OPM) and OGE; spell out OGE's authority to issue ethics regulations independent of OPM; give instructions for updating disclosure reports with respect to any income and honoraria received by a nominee as of 5 days before the scheduled date of the Senate committee hearing; define staff functions in support of an advisory committee composed in whole or part of special Government employees; and establish requirements and procedures for the creation of and follow-up on ethics agreements.

CONFIDENTIAL FINANCIAL DISCLOSURE SYSTEM

In May 1983, this Office sought a delegation of authority from the President under 5 U.S.C. App. 207(a) to revise the regulations concerning the confidential financial disclosure system for Federal employees in positions below grade GS-16. The revisions were circulated by the Office of Management and Budget (OMB) within the executive branch for comment. There was immediate objection by numerous agencies to the requirement that the confidential statements be in the same form as that used for a public financial disclosure report (SF 278) under the Ethics in Government Act. Several agencies expected problems and resistance in seeking to obtain the SF 278 report from

some 100,000 federal employees. They expressed fear that the requirements would be challenged in court and that special Government employees would refuse to accept advisory positions with the Government as a result of the requirement. The need to hire additional employees and the expenses attendant to collection and review of the statements were also cited as matters of concern.

OGE was of the opinion that a confidential reporting system in the same form as the public reporting system had to be adopted by reason of an opinion of the Office of Legal Counsel (OLC) of the Department of Justice to that effect. A number of agencies joined in a request of OLC to reconsider its opinion, which it did. However, it adhered to its original conclusion.

As a result of OLC's opinions and the agencies' strong reaction to the adoption of a confidential system requiring the same form as the public reporting system, OGE feels that the only viable recourse is legislation. We are working on a proposal to seek a legislative change, which will be circulated for agency views before an administration consensus can be reached as to its necessity. In the interim, Executive Branch agencies continue to collect confidential statements.

POST-EMPLOYMENT CONFLICTS OF INTEREST

At the time the Ethics in Government Act was signed into law, Title V of the Act contained the amendments to 18 U.S.C. Section 207, a criminal provision designed to disqualify former officers and employees from participating in matters relating to their previous official activities and responsibilities. Sections 207(a) and (b) were designed to prevent any former employee from switching sides and representing a private client in the same matter for which he or she had previously represented the Government.

Section 207(c), since it is not limited to matters in which the employee was involved, rests on a different theory. Former high-ranking employees are barred for one year from representing anyone before or, with the intent to influence, doing business with their former agencies.

In 1983, when this Office testified before your subcommittee on post-employment we mentioned certain areas of particular concern to the Office. These areas continue to concern us. We also advised that the post-employment rules have long been a subject of debate. They continue to be an area of controversy today. Since nothing in the Act requires a former employee to decline employment with any organization, regardless of dealings with that organization while a Government employee, critics suggest that broader restrictions are required in order to prevent subjective influence on federal employees, to protect the Government's interest in confidential information made available to its employees, and to guard against the appearance of conflict of interest on the part of its employees. On the other hand, opponents of further restrictions contend that the exchange of employees from private industry to government and vice versa is beneficial to the government to the extent such restrictions impose burdens on departing employees, they make public employment less attractive, and thus burden the Government itself. We have very little empirical data to support either side of the controversy. Our experience has not revealed, however, that the agencies have difficulty in implementing current laws and regulations.

In summary, Mr. Chairman, we feel that the Office of Government Ethics continues to implement fully its statutory mandates and to provide a valuable service in directing the overall Executive Branch policies regarding conflicts of interest.

I will be happy to answer any questions you may have.

Senator COHEN. Our next witness will be Bernhardt Wruble, the first director of the Office of Government Ethics. Shortly after the Ethics in Government Act of 1978 was signed into law, Mr. Wruble set up the OGE and directed it for its first year. He has had a distinguished legal career both in the public and private sector.

We appreciate your taking time to come testify.

**TESTIMONY OF BERNHARDT K. WRUBLE, FIRST DIRECTOR,
OFFICE OF GOVERNMENT ETHICS (1979)**

Mr. WRUBLE. Good morning, Mr. Chairman, Senator Levin. Thank you for the opportunity to testify today.

I have submitted a written statement. I don't propose to read it here. I will state so much of my position as is necessary to explain it, and thereafter, would welcome any questions you may have.

I was the first director of the Office of Government Ethics. Executive Order 11222 was the law then, as it is now. We took the Executive order as being the restrictions under which we were operating.

I want to speak with particular reference to the question of the "appearance of impropriety" standard, which is set forth in the Executive order. In addition, it has been adopted in the regulations issued by the Office of Personnel Management and the individual Government agencies, including the Executive Office of the President, in an even more direct fashion. That is, the language promulgated by the agencies states categorically that employees "shall" avoid actions, which, whether or not specifically prohibited, would create an appearance of impropriety.

This is stronger language than that contained in the Executive order.

I heard Mr. Martin testify today in a manner different from the statements attributed to him previously. He stated that the appearance of impropriety standard is not merely aspirational, but that there is some sort of bond between aspiration and proscription. I think it is not something we merely hope for. I think it is a prohibition we do, in fact, need to enforce. And I think that is the way that the Executive order has been treated since its issuance, which was 20 years or so ago—as actual prohibition, in fact. And such actual prohibition should be maintained.

The Government is properly concerned with appearances. Appearances are key here, because we are dealing with trust in Government. The Executive order affects the public's perception of what their Government is about. If you worry about such perceptions, you, by force of logic, are immediately concerned, not just with the actuality of an act, but with the appearance of the act.

Basically, this Government of ours is government represented by fairness and by concern for just dealings, not dealings that are swayed by unspoken influences. It is a bedrock principle, without which I think this Government cannot properly function. There are, at least, two commonsense reasons why the Executive order should bar actions which appear improper, not merely those in which impropriety is shown.

First, if a particular activity that looks wrong and has bad appearances can be explained away merely by technical compliance,

public confidence would be shaken. It does not matter that there may be some technical out. If it appears wrong, it has done damage to the Government.

Second, it is difficult in particular cases to go behind the scenes and prove that actual impropriety has taken place. In exactly the kind of circumstances where you want compliance, you encounter special difficulties in proof. I think putting that kind of burden of proof on the Government on a continual basis would frustrate the system.

The problem that arises when somebody throws doubt upon the propriety of the appearance standard, throws doubt upon its validity or enforcement, is that it, too, creates a perception problem. It is the kind that Senator Levin referred to previously. Once you cast doubt upon the propriety of the standard in any way, you immediately impart the message that the standard may not be enforced. If the standard isn't enforced, if public officials get that idea, then it gives them more flexibility in their own thinking as to what is required of them in ethical areas.

That is intolerable. I don't think that you attack this problem by rolling back the standard. I don't think this is the time to ask less of Federal employees with regard to their ethical obligations. What needs to be done is to particularize the standards. That is, we talk about the "appearance of impropriety" in broad terms. What we need to do is the hard work of particularizing what that phrase means, and the kinds of instances that we're concerned with. It can be done.

This may seem like a job that is governmentwide and very broad, but there is nothing that prevents drafting regulations and explications of what "appearance of impropriety" means. Let me go back. The issue has been posed as to whether an act that has the appearance of impropriety is a "violation" of an Executive order. The answer is, I think, yes, it is a violation of an Executive order. It is also a violation of the regulations which have been issued to implement that Executive order. But there are problems in reaching that conclusion, and there are problems remaining even after stating that it is simply a "violation."

First of all, it doesn't end the "wobble room." That is, you do close a gap when you say that an act that has the appearance of impropriety is a "violation," but not entirely. You create another set of problems because somebody can still take the position that a particular set of actions did not sufficiently create an improper appearance as to fall under the standard.

Thus, once you close one door, all you do is show that there is another door to open.

The only way to address those problems ultimately is to begin to bring some concreteness to ethical requirements. For example—and I am not saying what the results should be in this particular case—but in the area involving the appointment by a Federal official or a person to a job with an agency or board, the issue may be raised whether or not someone who has dealt with the candidate, in business circumstances, must recuse himself, or provide disclosure before he can go forward, or can participate in that without recusing himself. That kind of situation can be considered in advance. And we ought to talk about it in advance and tell the offi-

cial what is required in that situation, for two reasons. One, so that he does the right thing. And two is, so that afterward, we don't get into a debate about it and try to decide, afterward, what the standard should have been in that case.

We get compliance, and he gets fairness.

This would let us avoid the kind of discussion that took place this morning. Mr. Martin expressed concern, perhaps justifiably, that in the case of an employee who has done something which appears to be improper, Mr. Martin would be more effective in counseling him by not listing on his record or publishing for press review that a violation occurred. He said that would be counterproductive.

Well, maybe that would be, but I think somebody said that minimum of anything in the universe is two. If you're going to create that ripple on the one side, what are you creating on the other side?

The problem is that the argument therefore not labeling something a violation is then used in a case where someone has done something that you think is improper, or truly appears to be improper. And now you are forced to say, Well, it's just an appearance; we can't call it a violation.

In other words, the argument used in a counseling situation, for not casting something as a violation is that you should not unnecessarily tar somebody's career. But if you accept that, it leaves a legal maneuver open so that when somebody has done something that has a very basic appearance of impropriety, you no longer can cast it as a violation, and so you let him off the hook.

The question arises, why is it so important to call something a violation? I have, at times, experienced the same reluctance to do that as Mr. Martin mentioned this morning. In counseling situations, or other situations where you want to take corrective action, it may interfere with the objective you truly want to reach.

But the situations we are most concerned about are those where the public is involved and the press is involved, and we are dealing with public trust in government as the basic issue. The press wants to know whether there has been a violation, because the public wants to know it. They want to know it for a basic human reason. They want to reach a conclusion about the ethical sensitivity and moral fiber of the individual involved.

And they want the work done for them by someone in charge, like the Director of the Office of Government Ethics, or someone in the Attorney General's Office, because they find it difficult to reach such conclusions on their own.

They make demands to know whether or not it is a "violation" because they believe they're entitled to know. It is not merely a technicality. It fulfills an expectable human need.

So, again, the way I think you deal with a situation like this, if there's a word for it—you "demurkify" it. You take away the clouds and the murkiness: You tell people what they can do in particular situations so they know what's permissible.

If there are situations that you can't define and can't address, so be it. Let them ride. Let's direct our attention and our energies to that percentage of situations, which I think is high, that we can address. This performs two functions. It not only addresses some sit-

uation directly, but also it lets you view the unexpected situations with greater clarity. You know where you are on the scale of things, and that's helpful.

The only reason I feel as confident about that type of approach as I do is that, in a way, we've confronted the situation before—in the area of post-employment restrictions—where there was a lot of distress within the Government.

The newly formed Office of Government Ethics asked to be given the chance to do something in the way of clarifying these post-employment obligations, and we undertook the job, and it helped. We involved a lot of people. We could not do it in-house. We did not know enough. We were not smart enough. We didn't have enough experience. But there are a lot of people out there in Government who do. They can help put together a set of directives that is very helpful in terms of resolving these problems.

So I suppose that that would be my recommendation and my suggestion.

Let me just say this. This is precisely the intended function of the Office of Government Ethics. This is what section 402 tells the Office of Government Ethics to do: go out and draft these rules; go out and find what the problems are and determine proper solutions.

Moreover, if you've developed specific rules in advance as to what somebody should do, then Congress can see whether the job has been handled right, in advance. Then, when the problem comes up in a heated political situation, you don't have to worry about whether a rule has been pasted together to accommodate one person or another. You get a crack in advance as to what the rules should be in a given situation.

This process also allows individual agencies to particularize ethical obligations. For example, take the *Burnett* case, which dealt with the cashing of checks for aged veterans. I doubt if the Office of Government Ethics would perceive that problem from where it sits. But with particularized rules from OGE, another agency is given a basis to particularize rules for its own employees.

I think, for example, that the *Burnett*¹ case and the other case mentioned that dealt with the property of the Indians, should not be lost somewhere in the back of a committee report for ethics aficionados. You can get benefits out of the case and leverage its value by making it part of large guidance, so that another poor soul doesn't start cashing checks for aged veterans.

An agency employee may not have an opportunity to read that case. But tell him he's not to do it, and he won't do it again. Or, when you catch him doing it again, you won't feel bad about giving him a 30-day suspension because it will be clear.

There is an advisory opinion service that the Office of Government Ethics sponsors. But an advisory opinion doesn't give the kind of broad guidance that Government employees need.

I think that an effort to develop specific guidance is worth it. And I think the benefits, both for Congress and for Federal employees, will justify that kind of effort. That's what I recommend.

¹ See p. 160.

Senator COHEN. Thank you very much, Mr. Wruble. I think you have answered most of my questions. I would point out one of the ironies involved. I think Mr. Martin is acting out of some pretty sincere convictions on his part. He thinks the Executive order as it's written is unfair in its application and can cause great damage to individuals.

I don't question his motivation, but one of the things we did in 1983, by strengthening the Office of Government Ethics, was to try to give it more independence. He's in a tough position; you were in a tough position; the Director must pass judgment on people who are above him. We want to make him more independent.

By taking this kind of interpretation, Mr. Martin has put more pressure on himself rather than less by saying, "We are not going to apply it broadly, but we are going to get into these ad hoc evaluations of what's a violation and what is not, "depending upon how he determines what its impact is."

What he has done is put himself in a position of having greater pressure come from the White House and others saying, "For God's sake, don't label this a violation."

Mr. WRUBLE. I think that's right.

Senator COHEN. So it's totally counterproductive in that sense toward getting more independence.

Senator Levin.

Senator LEVIN. First, let me thank you for your testimony, which is extremely helpful, thoughtful and will not only add to our thought processes but add to our vocabulary with "demurkification". [Laughter.]

Mr. WRUBLE. May I apologize?

Senator LEVIN. No. [Laughter.]

Mr. WRUBLE. To you or anybody else.

Senator COHEN. He's been working for Al Haig. [Laughter.]

Senator LEVIN. You stated some important thoughts with some complexity and subtlety and clarity, too. And I appreciate that. One of the arguments that you were making is that it's important that we call the appearance a violation, or conflict of interest, or appearance of conflict of interest a violation—because we are dealing with public confidence in Government and credibility of Government.

And I agree with you on that. It is important that we continue to do so. Isn't it also important that we call the appearance of a conflict of interest a violation as long as it's clear that the law calls it a violation?

Putting aside the substantive reasons for doing it, and you can argue back and forth, those who might be happy with Mr. Martin's views on that, isn't there an overwhelming reason at the moment for calling it a violation, which is that the Executive order and the law says—

Mr. WRUBLE. I agree with the Senator entirely on that. That's what the Executive order says and that's what the law is. That's what we're bound to enforce.

Senator LEVIN. That's what really troubles me about Mr. Martin's position. I can see some pros and cons about the substance of the argument. Should the appearance be a violation if in fact there's no reality to it?

You could argue pros and cons on that. I happen to come down on the same side you do. I'm open to arguments on that one, at least. Certainly, I would treat the situation differently. What I'm not able to do is if someone who is supposed to be enforcing the law is rewriting it.

Until he runs for President, he ought to be carrying out the laws and not writing Executive orders. That's my principal, demurkified position at the moment. [Laughter.]

I wanted to give you one set of facts. If a Federal agency official is involved in the process of approving contracts and is the critical officer in that process, and gives consultant contracts to a firm that his brother is the principal officer in, putting aside the appearance issue, is that a violation of law? Do you know? If there is no financial interest of the Federal officer in the company?

Mr. WRUBLE. If his brother's financial interest cannot be imputed to him, it wouldn't violate the criminal statute. It's not that it can't be seen as a violation of other noncriminal statutes.

For example, the Executive order——

Senator LEVIN. Putting aside the appearance of conflict, is that in and of itself a violation of law? Is it an actual conflict if there is no financial interest in the firm?

Mr. WRUBLE. He hasn't gone to work for this firm?

Senator LEVIN. No, he's in the Federal Government. He keeps approving contracts in this firm that his brother owns, but he has no financial interest.

Mr. WRUBLE. Absent the appearance standard, it would be my understanding that it does not violate the law.

Senator LEVIN. That's my understanding, too, although I'm not 100 percent sure. I would think that we would like to continue a prohibition on the appearance of conflict for many circumstances, including that one. I think that a person ought to recuse himself. I don't think we ought to be granting the federal taxpayers' financial contracts to our brother's firms. And if appearance isn't a violation, you can not do it. There's no actual conflict there. I don't have any interest in my brother's firm. Look it up in the corporation filings in Virginia, or Massachusetts, or wherever the firm is, or Michigan. Hey, I don't own any of that stuff.

So if we want an appearance standard, it seems to me it should be in effect not only because it's the law, we want it substantively because there is no way to get at what should be gotten at, which is that it looks terrible. It looks like hell for a Federal official to be giving contracts to their brothers or sisters' consulting firms, or any other kind of firms.

The consciousness of how it looks is critical. "How will it look if I did this?" That sensitivity which Senator Cohen was talking about and you were talking about, how would it look if I did this is something we want to make people conscious about. And if you wipe out an appearance standard, as you put it, people aren't going to care how it looks. They're going to look instead at: Do I own stock in that company? Do I benefit? And it just incidentally happens to be owned by my brother.

So, thank you again.

Mr. WRUBLE. I think you're right, Senator. I think it would make people very unhappy to have that situation prevail and not be able to correct it.

Senator COHEN. Thanks again, Mr. Wruble.

[Mr. Wruble's prepared statement follows:]

Testimony of Bernhardt K. Wruble
Before the Senate Subcommittee on
Oversight of Government Management

My name is Bernhardt K. Wruble. I served as the first Director of the Office of Government Ethics and held that position from the inception of the office through the greater part of 1979.

With the help of my staff and the assistance of many good people throughout the entirety of the Executive Branch of the government, I was responsible for implementing OGE's financial disclosure system and for developing the regulations which detail the obligations of federal employees with respect to post-government employment.

Briefly, as to my background: I am presently a member of the law firm of Verner, Liipfert, Bernhard, McPherson and Hand here in Washington, D.C. Prior to entering government service, I was a member of Simpson Thacher and Bartlett, a law firm in New York City. I became the Principal Deputy General Counsel to the Department of the Army in 1977. While serving in that position that I was asked to organize, set policy for, and initiate the operations of, the new Office of Government Ethics, established by the Ethics In Government Act of 1978. After leaving that post, I served at executive level in the Department of Energy.

I testifying today at the invitation of the Committee with respect to Executive Order 11222, "Prescribing Standards of Ethical Conduct for Government Officers and Employees," which,

for nearly twenty years, has stood as the basic directive for the ethical activities of employees of the Executive Branch. I would like to address particularly the content of the "appearance of impropriety" language contained in Subsection 201(c) of the Executive Order. Specifically, Subsection 201(c) recites:

It is the intent of this section that employees avoid any action, whether or not specifically prohibited by subsection (a), which might result in, or create the appearance of --

- (1) using public office for private gain;
- (2) giving preferential treatment to any organization or person;
- (3) impeding government efficiency or economy;
- (4) losing complete independence or impartiality of action;
- (5) making a government decision outside official channels; or
- (6) affecting adversely the confidence of the public in the integrity of the Government.

This language is substantially embodied in federal implementing regulations. Section 735.201 of 5 C.F.R. provide that "An employee shall avoid any action whether or not specifically prohibited by this subpart which might result in, or create the appearance of" the same categories of actions enumerated in the Executive Order. Similar language is set forth at 3 C.F.R. § 100.735-4, applicable to the Executive Office of the President and associated agencies.

Recent statements have raised the question whether the injunction against activities that create an "appearance of impropriety" is a true prohibition or is merely "aspirational in nature." The latter characterization, implies that if an

employee were to undertake such an activity, we might be unhappy with him, but he would not "violate" the Executive Order or the implementing regulations. I disagree with that interpretation. I believe that an actual prohibition was in fact intended and should, in the public interest, be maintained. I believe, however, that some feel a discomfort in dealing with a prohibition that is based on "appearances," rather than particularized acts. I propose to return to this important area later in my testimony.

It seems to me that the government is properly concerned with the "appearance" as well as the actuality of impropriety. The underlying objective here is to preserve the trust and confidence of the public in the integrity of their government. Indeed, there is the bedrock precept and expectation that the benefits, the offices and the opportunities available in the government will be dispensed fairly and are not for sale. Because public perception is the operative factor, it follows that the appearance of an act is a critical issue.

There are at least two common sense reasons why the Executive Order should bar actions that appear improper, and not merely those where actual impropriety is shown. First, if a particular activity that looks wrong can be explained away by technical compliance or by relying upon some fine line of proof, then it is likely that public confidence in the government will be eroded notwithstanding the fact that there is some technical or legal "out."

Second is that where the ethics and honesty of government employees are involved, it would be unworkable and burdensome to require proof of actual impropriety in each case. Proof in these areas can be very difficult. For example, if an administrative judge were to accept a favor from a party after he had rendered his decision, we would view it as improper because of the corrupt appearance it creates, regardless of whether there is proof the judge's prior decision was made in anticipation of, or in consideration for, the favor.

Focus upon the "appearance" of an act is embedded in federal ethical regulation. The OGE regulations governing the post-employment restrictions (5 C.F.R. Part 737) contain repeated references to conduct being prohibited by reason of the improper impression that it creates. There are court decisions that have upheld the discipline of federal officials on the basis of their undertaking activities which appeared ethically inconsistent with the mission of the government agency that employed them, even though not specifically forbidden.

But there are other considerations relevant here. Disputes concerning ethical activity have a tendency to be highly charged. They can involve high emotions. They can affect an employee's reputation and livelihood. When a question is raised concerning a government official, moderating adjectives are often lost, and there is pressure to state categorically whether there was or was not a "violation." There can be unfairness. After all, the idea of regulating by "appearance" inherently involves a

degree of subjectivity. Therefore, I think many feel discomfort in implementing disciplinary rules that rely wholly upon the "appearance of impropriety."

For us, the solution does not lie in weakening the standard by stating that we merely hope that government employees will aspire to avoid improper appearances. Rather, it lies in strengthening its standard by developing more specific guidance. This has been done in other areas, and it is more effective and fair. It is more effective, because we can define and prohibit specific actions that suggest impropriety and therefore avoid entangling and difficult areas of proof as to what actually transpired. Moreover, such guidance would curtail the ability of an official in unseemly circumstances to claim a technical basis for escape. Certainly, telling employees in advance what they can and cannot do is more effective in securing compliance in the first place.

This is what was done in the area of post-employment "revolving door" activities by former governmental employees. After the Ethics in Government Act was passed in 1978, there were widespread and highly publicized fears of a "brain drain" -- that is, valuable employees threatened to leave government service because they viewed the law as unpredictably threatening to their livelihoods. (Many of the laws involved had been on the books for a long time, but the passage of the Act brought the restrictions forcefully to the attention of federal employees.) The Office of Government Ethics decided not to rely on after-the-

fact judgments, but instead to aid federal employees by giving advance guidance as to their obligations.

The regulations published at Part 737 of 5 C.F.R. provide many specific examples in an attempt to give concrete guidance. This particularization and detail was achieved by soliciting problems, advice and information from virtually every agency of the federal government. The solicitation resulted in a very large number of comments and suggestions. We also obtained copies of the advisory opinions that the Office of Legal Counsel of the Department of Justice had issued. Utilizing that raw material, we developed the guidance that now appears in the regulations. The process was expedited, and initial regulations were issued within two or three months.

The regulations were extensive, but the reaction by federal employees was not that they were burdensome. To the contrary, nearly all of the reaction was that the regulations were fair, served to clarify ethical obligations, and thus to allay fears, and were helpful. Some rough edges were ironed out by amendment to the statute.

It was to have been a future project of the Office of Government Ethics to develop similar guidance in other areas, including that with which the Committee is concerned with today, but that project was not undertaken during my tenure, and it has not been undertaken since. There is a formal advisory opinion service as contemplated by statute, but this is really no substitute for a comprehensive, readable guide.

This is the type of activity that the Office Of Government Ethics was created to undertake. Section 402 of the Ethics in Government Act of 1978, as amended, specifies that the Director of the Office of Government Ethics has the responsibility to develop rules and regulations to be promulgated either by the President or by the Director pertaining to conflicts of interest and ethics in the Executive Branch and the identification and resolution of such conflicts of interest.

I do not think that it is a valid objection that the number of situations that need be covered are too varied, or that the area is too broad, or that the issues in particular situations are too difficult. Similar objections were made when we tried to develop regulations for the post-employment problems. There may indeed be some areas that cannot be resolved and some problems that cannot be anticipated. But this is no excuse for not dealing with those that can be. A large number of problems can be addressed. Moreover, that effort sets the stage for better resolution of remaining problems.

Even in the absence of regulations particularizing prohibited conduct, government officials and employees must be held to propriety of appearance as well as to propriety in fact. Presently, we have to rely upon historically developed judgments on ethical values and behavior. When an employee violates those judgments he will be subject to discipline. The nature of the corrective action will be determined in the traditional manner, by taking into consideration the seriousness of the activity, the clarity with which the improper appearance is perceived, and other factors.

It is my view that we should not regard the "appearance" standard as "aspirational" because we find it difficult to enforce in some circumstances. Rather than abandoning the standard, we should strengthen it by giving it more concreteness and content.

Thank you

Senator COHEN. Our next witness is Ann McBride, Senior Vice President of Common Cause. Common Cause has a long history of advocacy in the ethics area. She testified before the subcommittee in 1983, when we considered the reorganization of the Office of Government Ethics. I am looking forward to her testimony this morning.

**TESTIMONY OF ANN McBRIDE, SENIOR VICE PRESIDENT,
COMMON CAUSE**

Ms. McBRIDE. Thank you very much, Senator Cohen, Senator Levin. I really appreciate the opportunity to testify before this committee and want to thank you at the outset for undertaking this very, very important oversight hearing. I'd first like to submit my statement for the record and focus my remarks on what I think is the central issue being considered here today; that is, Mr. Martin's misinterpretation of Executive Order 11122, and implementing regulations.

It's important to note at the outset that at his 1983 confirmation hearing before this committee, Mr. Martin applauded the Executive order. He said: "It should share equal status with the conflict-of-interest laws and the Ethics in Government Act."

He termed the Executive order a "cornerstone of standards of conduct for all Federal employees."

Last January, however, in explaining how OGE had overturned the staff's original conclusion that Mr. Meese had violated the prohibitions against appearance of conflict of interest, Mr. Martin expressed a different view. This is the letter, Senator Cohen, that you cited earlier in which Mr. Martin said that violations of the appearance standard are merely aspirational, and he relabeled violations as "problems."

What Mr. Martin said is that: "An appearance problem only rises to the level of a violation if, after looking behind the appearance, the Government can demonstrate any substance to the appearance."

Mr. Martin apparently is not only attempting to establish a totally new interpretation of the Executive order, but he would add a new standard for determining violations, a showing of actual improper influence, a causal relationship.

The effect of this would really be to eviscerate the Executive order. Mr. Martin's incorrect interpretation of the Executive order represents in our view a serious, dangerous and radical change in ethics standards governing Federal employees.

Mr. Martin's interpretation of the aspirational nature and the unenforceability of the appearance standard is unique and it's wrong. Mr. Martin's interpretation flies in the face of the language of the Executive order. It stands in sharp and isolated contrast to the interpretation and enforcement of the Executive order by agency ethics officials, by inspectors general, by OGE itself, by the Merit Systems Protection Board and by the courts.

Mr. Martin's interpretation of the Executive order would make ethics enforcement a virtually impossible task, and would really stand—and I think stands today—as an open invitation for increased conflict-of-interest problems throughout the Government.

Let me take a moment just to look briefly at each of these areas. As has been mentioned by both you, Mr. Chairman, and Senator Levin, the Executive order is clear on its face. This has been restated by Mr. Wruble here this morning, and by the statement of David Scott.

It is clear that the appearance of conflict of interest is a violation of the Executive order.

Second, Mr. Martin says this morning that the Executive order should be used in a prospective way. It's forward-looking. But, in fact, the Executive order has been enforced. Robert Tobias, president of the National Treasury Employees Union, was quoted in a recent National Journal article as saying: "People are constantly disciplined and discharged based on the appearance of impropriety."

We looked at Inspectors General Reports, which are issued twice a year. And what we found is that the appearance standard is used by IG's for disciplinary action.

In our testimony, we cite a number of examples from HUD and the Small Business Administration, from the Department of the Navy, where the employees were disciplined because of the appearance of conflicts of interest.

Other examples, Mr. Chairman, have been cited here this morning.

In none of the cases—and this is important when you look at what Mr. Martin is trying to say when he says you have to get behind the cases to determine if there is substance to the appearance—in none of the cases looked at by the National Journal were the agencies required to demonstrate that the employee's private financial interests had actually affected the performance of his public duties, as Mr. Martin's interpretation, if accepted, would require. In each case cited by the National Journal, the sanction was imposed entirely because the employee had created the appearance of conflict of interest.

Further, Mr. Martin has hung a lot on the Merit Systems Protection Board. In all these cases the Merit Systems Protection Board agreed.

Mr. Chairman, I would like to say that after Mr. Martin's incorrect interpretation of the Executive order, we really wanted to find out in a comprehensive way how the Office of Government Ethics was actually applying the ethics standard.

Frankly, we wanted to know if Mr. Martin had just applied this interpretation in the *Meese* case, or was he applying it in a wholesale way throughout the Government.

So we filed a very standard Freedom of Information Act request, asking for a copy of all advisory opinions, letters, and other written materials produced by OGE regarding, in whole or in part, the appearance of conflict of interest.

Well, I have to tell you, it is the kind of standard request that we have filed dozens of times. The response was not standard.

Mr. Martin told us we could have the materials if Common Cause would be willing to pay fees of at least \$18,000 and that if we wanted OGE to proceed we should mail them a down payment of \$3,600.

Needless to say, we have not mailed the check, so when we are looking at how the Office of Government Ethics rules, we are relying primarily on the publicly available advisory opinion.

But as you mentioned, Senator Cohen, in statements that you made, OGE itself, statements, advisory opinions signed by Mr. Martin support the conflict of interest in the appearance cases.

Mr. Martin says in a December 30, 1983, advisory opinion on the applicability of conflict-of-interest rules to a certain Federal employee—there are Mr. Martin's words—there would be a "clear appearance of impropriety which cannot be overcome."¹ His language, "which cannot be overcome." Presumably cannot be overcome by looking behind the appearance to find substance.

These are his words, and this is what OGE has been doing. Throughout the Government, agency ethics officials use the appearance standard as prospective advice as well as recommending disciplinary action.

The question was raised by Senator Levin this morning about equal protection, and I want to say that, very sadly, this is not a theoretical question. Some employees at the Interior Department have raised with their ethics officials the problem that they feel that they are being held to a higher standard than the one Mr. Martin articulated in the Meese case.

In addition, the Federal courts have determined that disciplinary action can be based on the appearance of conflict of interest. Mr. Martin has indicated that the language is too broad, it is too vague, it can't be enforced. The courts, however, have really just not adopted this view.

In a 1982 case, in a decision written by Judge Richard Posner, the court rejected petitioner's argument that the code was too vague and that it did not authorize adverse action.

Also, Senator Cohen, you raised this morning the question of case law and whether Mr. Martin had examined the case law.

In response to some earlier written questions by Senator Levin, he made the flat statement that developing case law supported his view. This morning he says that he has looked at one case. In fact, he admitted in the *National Journal* that the subject of that case, which was enjoining a contract, could be—and his quote was—"a little different from adverse actions against personnel."

In a later case, addressed to exactly the same issue, the court specifically said—while it upheld the earlier decision by enjoining contracts—the court specifically says, "An appearance of impropriety may warrant disciplinary action against the offending official."

Let me just close by saying a few things about why we believe the appearance rule is important and is necessary.

We think it is necessary really to preserve Government integrity. The appearance rule is necessary to ensure that all of us receive evenhanded, impartial judgments by public officials.

Public officials should not mix personal finances and public duties, even if there is not a causal relationship between the two. The reasons for this are simple, and they are straightforward.

¹ See p. 154.

First, the mixing of personal financial affairs with Government business does not merely give the appearance of conflict of interest; it does not constitute a kind of tentative conclusion subject to further investigation.

Archibald Cox has really highlighted the basic problem that we have and the need for a prohibition against the appearance of conflict of interest. He says, "Neither the public official nor anyone else can possibly be sure that the public official's judgment was unaffected."

Second—and this has certainly been discussed this morning—the prohibitions are necessary because appearances of conflict of interest undermine confidence in the integrity of Government. Even if a public official were to be able to maintain complete impartiality of judgment, the appearance of Government officials' mixing personal financial affairs and public responsibilities undermines public respect for government.

I think the most succinct statement I have heard on this was made by Senator Strom Thurmond during consideration of the Senate Ethics Code in 1977. He said, "There is one thing my father told me when I started out in public life. He said, 'You have got to appear right as well as be right.'"

Finally, Mr. Martin's emasculating interpretation of the Executive order would impose an unnecessary heavy burden on Government ethics officials; enforcement would be very difficult.

We want to finally thank the subcommittee again for undertaking this oversight of the Office of Government Ethics. Mr. Chairman, we agree with your printed statement that Mr. Martin's position is "unprecedented." We agree with you, Senator Levin, that Mr. Martin's interpretation of the Executive order is simply wrong, and we agreed with the statement of Common Cause Chairman Archibald Cox that his interpretation is frightening.

We stand ready to work with this committee and both of you, who have done so much to work to guarantee that the public's business is separate from private interests. We will work with you in any way we can to ensure that the ethics laws and regulations are correctly applied and vigorously enforced.

Thank you very much for your time.

Senator COHEN. Thank you very much.

Can I just inquire, have you conducted a survey of some of the agency ethics offices?¹

Ms. McBRIDE. Yes.

Senator COHEN. Have they disclosed to you that one of the problems they have, apparently, is the postemployment situation? Would you care to elaborate a bit on what your survey found?

Ms. McBRIDE. Our survey found that this was one area in which they thought there were real problems, yet it was also an area in which, in our initial survey, we could not find out how much was actually being done.

Since then, we have gone back to ethics officials and asked them actually what is being done in monitoring, enforcing, implementing at the agency level these bans on revolving door provisions, and we

¹ See p. 246.

find, unfortunately, that not much is being done and that it really is impossible to gauge the extent of the problem.

And ethics officials in fact are not doing much, but it is their perception that this is a real problem and a big problem. Not only should legislative remedies be produced, but we also believe that the monitoring and implementation of the existing laws is one of the things that the Office of Government Ethics should provide leadership on and give some direction to those agency ethics officials, including models for how you monitor this.

I think much more could be done, and it is clearly recognized by these officials as a real and a serious problem.

Senator COHEN. As you heard this morning, the Justice Department has discontinued the requirement that any of its attorneys file the confidential disclosure statement. I find that to be somewhat staggering in its implications.

But what do you think about the recommendation that, I suspect is going to emanate from Mr. Martin in terms of reducing the detail of the disclosure? Is there merit to his argument that as long as you know there is one share of stock or 10,000 shares of stock, that is all that has to be listed? Do you think you don't have to have the specific details in order to determine whether or not an official is complying with the OGE standards?

Ms. McBRIDE. Mr. Chairman, there are actually two parts to what Mr. Martin said here this morning.

The first was, he said he would greatly lessen the requirement for public disclosure, and, again, when he came before this committee in his confirmation hearing, Senator Roth asked him the question: Do you think that the public disclosure requirements are overbroad, or are they adequate? He told this committee he felt that they were adequate.

Obviously, he has had a change of heart. We do not think there should be any cutting back in the public disclosure requirements. Mr. Martin says there is no de minimis for conflict of interest.

There certainly is a de minimis in terms of disclosure. You do not have to disclose in most cases until a holding reaches \$1,000. We think those categories of value are fair. It is important to know the magnitude of a holding, and we think that this Congress should really continue to resist proposals, which certainly have been offered, to weaken public financial disclosure.

Second, we also think the confidential system should be kept in place and that there should not be restrictions in terms of cutting back on information.

When you look in the area which has been discussed here this morning, contracting and procurement, many contract and procurement officers do not reach the level of the GS-16 or above. Many of the people who are making day-to-day decisions in which there could be significant conflicts of interest are in that level GS-13 to GS-16.

So we think the confidential system should be kept in place. We think the information should not be reduced, and we think that OGE and the White House really are long overdue in acting on this particular problem.

Senator COHEN. Thank you very much.

Senator Levin?

Senator LEVIN. Thank you, Mr. Chairman, just a couple of questions.

Your request of the OGE for materials under the Freedom of Information Act was to determine whether or not, as I understand your testimony, their interpretation of the Executive order was unique for Mr. Meese or whether that has been a generalized interpretation.

Did they answer your question that it has been a generalized interpretation, or have they said that they can't answer that; they want you to determine that from reading the 18,000 dollars' worth of materials?

Ms. McBRIDE. Unfortunately, with our budget, we will not be getting the 18,000 dollars' worth of information. We did not pose the question, Senator Levin. That was the reason we wanted the information.

We made just a simple request following the outline on how you use the Freedom of Information Act. We simply said we would like to get the information, anything written, that deals in whole or in part, letters, advisory opinions, with the appearance of conflict of interest.

We did not pose the specific question of whether their ruling in the *Meese* case had been unique or whether it is generalized. It was our hope to get the information and, from that, to make this determination. We also wanted to know whether Mr. Martin had significantly changed the interpretation from previous OGE directives.

Senator LEVIN. What we will do is ask limited questions for the record to determine the answer to that question. It is a fair question. We will frame the question something like—give us a half dozen instances in other situations where you applied your interpretation that the appearance violation is not a violation—and try to get that for the record.

I think that will be helpful because he has given us that assurance, I believe, that it has been a generalized interpretation. We will ask him for six examples of where it has been.

Ms. McBRIDE. That would be helpful. Thank you.

Senator LEVIN. There are some other questions, by the way, for the record, of Mr. Martin that I would like to submit, Mr. Chairman.¹

I also think we ought to put in the record the correspondence, if it already hasn't been put in the record, between himself, me, and there may be some other correspondence. But I would like in the record some letters that I sent to him as a response in the record.²

And also, I think these excerpts from the three cases that we have made reference to also ought to be made part of the record.³

Senator COHEN. Those will be synopsized and included as part of the record.

Senator LEVIN. Thank you.

Senator COHEN. I just have one other question that has to do with the Department of Interior case that you mentioned.

¹ See p. 194.

² See p. 179.

³ See p. 154.

If you can supply for us any details relevant to those cases, it might be useful to us. Where you say that the allegation of a double standard between the OGE interpretation and the executive branch agency applications for specific employees has been raised by those employees, it would be useful to us to study how this problem is now going to perhaps lead to an equal protection problem.

Ms. McBRIDE. Yes, we can give you the name of the ethics officer who said that, and we are certainly free to provide it to this committee.

Senator COHEN. Thank you very much.

Ms. McBRIDE. Thank you.

[Ms. McBride's prepared statement follows:]

PREPARED STATEMENT OF ANN McBRIDE

Mr. Chairman and Members of the Subcommittee, I appreciate this opportunity to appear on behalf of Common Cause before the Subcommittee on Oversight of Government Management on issues relating to oversight of the Office of Government Ethics (OGE). I am Senior Vice President of Common Cause, a citizens' organization of 250,000 members. I have worked on ethics-in-government issues for most of my twelve-year tenure at Common Cause and participated, on behalf of Common Cause, in the development and passage of the Ethics in Government Act in 1978.

We thank this subcommittee for undertaking this review of the activities of the Office of Government Ethics. Today's hearing presents an important opportunity to assess whether the Office of Government Ethics is fulfilling its statutory mandate to provide direction in "preventing conflicts of interest on the part of officers and employees of any executive agency."

My statement covers four issues which are central to OGE's implementation of its duties under Title IV of the Ethics in Government Act of 1978 and on which we have been asked to comment: first, OGE's interpretation of Executive Order 11222 and the standard of conduct regulations; second, the administration of the government ethics programs by executive branch agencies; third, the implementation of the public and confidential financial disclosure systems by OGE and designated agency officials; and finally, enforcement of post-employment conflict of interest provisions.

I. Executive Order 11222 and Implementing Regulations

Executive Order 11222, issued in 1965, prescribes standards of conduct and authorizes agencies to issue regulations to implement its provisions. At his 1983 confirmation hearings for the position of director of the Office of Government Ethics, David Martin applauded Executive Order 11222. He stated that the Executive Order, which sets out non-criminal provisions governing executive branch conflicts of interest, "should share equal status and importance with the conflict-of-interest laws and the Ethics in Government Act."

Recently, however, Mr. Martin has characterized compliance with major portions of the Executive Order dealing with the appearance of conflicts of interest as "aspirational" and relabeled violations as simply "problems."

The reaction to Mr. Martin's new position from those involved in ethics issues was immediate and clear. Senator William Cohen (R-ME) said: "Mr. Martin's position . . . is unprecedented." Senator Carl Levin (D-MI) said, "I find Mr. Martin's interpretation of the Executive Order and regulations issued pursuant thereto to be simply wrong." Common Cause Chairman Archibald Cox, former Solicitor General and Watergate Special Prosecutor, has termed Mr. Martin's interpretation "frightening."

Mr. Martin's incorrect interpretation of the Executive Order represents a serious, dangerous, and radical change in ethics standards governing federal employees. It is clear that Mr. Martin's interpretation of the Executive Order conflicts with the

Executive Order on its face and with the interpretation and enforcement of the Order by agency ethics officials, Inspectors General, OGE itself, the Merit Systems Protection Board, and the courts.

Mr. Martin's Current Interpretation of Executive Order 11222

This past January, in a letter to Senator Strom Thurmond (R-SC) explaining why OGE had rejected OGE staff's original conclusions that attorney general-designee Edwin Meese had violated ethics regulations, Mr. Martin articulated his new interpretation of Executive Order 11222. Mr. Martin stated that the requirements of Executive Order 11222 and implementing regulations that employees "avoid any action . . . which might result in, or create the appearance of . . . losing complete independence and impartiality" was not a mandatory rule, but merely an "aspirational" goal.

Mr. Martin further asserted that the appearance of losing impartiality may be characterized as an "appearance problem." An appearance problem rises to the level of a violation, according to Mr. Martin, only if after looking "behind the appearance," the government can demonstrate "any substance to the appearance."

Apparently Mr. Martin wishes to establish a totally new definition of the standards of conduct. In addition, he would add a new standard for determining violations -- a showing of actual improper influence on decisionmaking, a causal relationship. The result of the application of this doctrine would be

effectively to eviscerate standards of conduct governing conflicts of interest that have been in force for decades.

The Prohibitions in Executive Order 11222 are Mandatory

Mr. Martin's interpretations are in sharp contrast with the actual language and past interpretation of government rules in this area.

On their face, the prohibitions in Executive Order 11222 and agency regulations that employees should avoid actions that "might result in, or create the appearance of -- (1) using public office for private gain; (2) giving preferential treatment to any organization or person; . . . [or] (4) losing complete independence or impartiality of action . . ." are not aspirational, but mandatory and enforceable. As David R. Scott, former General Counsel and acting Director of OGE, unambiguously stated: "The appearance of a conflict isn't just aspirational The regulations are written in such a way, and have always been interpreted, that appearance is an aspect of the standards of conduct that stands on an equal par with actual conflict." (Emphasis added.)

Implementation of the Executive Order

The Executive Order has been enforced in just this way throughout the government. For instance, Robert M. Tobias, president of the National Treasury Employees Union, was quoted in a recent National Journal article ("Agency Ethics Officers Fear Meese Ruling Could Weaken Conflict Laws," March 23, 1985) as

saying: "People are constantly disciplined and discharged based on the appearance of impropriety." (I am attaching a copy of the National Journal article to be submitted for the record.)

Inspector General Reports, which are issued twice a year, reveal that the "appearance standard" is used as the basis for disciplinary action. For example, in the Department of Housing and Urban Development, a construction analyst was reprimanded for violating standards of conduct by recommending for employment by a HUD client a contractor who had purchased the construction analyst's home. Also, in the Small Business Administration an assistant district director was removed from office for approving loans to borrowers with whom he had a financial relationship, including borrowers who had sold him property.

The recent National Journal article also documents several examples of agency enforcement of the prohibition against creating the "appearance" of "losing complete independence or impartiality of action." As the article noted, Mr. Martin's interpretation that "appearance only" was not a violation of the Executive Order

was probably news to the Housing and Urban Development Department (HUD) appraiser who was fired in 1979 for managing two slums in Chicago owned by his wife, to the Navy data processing administrator at a Puget Sound (Wash.) shipyard who was demoted to a nonsupervisory position in 1983 for working on a computer package for pharmacies with a company that held a contract with the shipyard, or to the federal coal mine inspector who was suspended for 30 days in 1984 for writing a letter to a coal company alleging that it turned down his sons' job applications because he had issued citations against the firm.

In none of the cases discussed, according to the National Journal, were the agencies required to demonstrate that the

employee's private financial interests had actually affected the performance of his public duties, as Mr. Martin's interpretation would require. In each case, a sanction was imposed entirely because the employee had created the appearance of losing impartiality. Moreover, in each of these cases, the Merit Systems Protection Board, the independent agency responsible for reviewing disciplinary actions against federal employees, agreed that the employees had violated agency ethics standards by creating the appearance of losing impartiality.

In addition, contrary to what Mr. Martin suggests, the advisory opinions issued by the Office of Government Ethics -- some of which are signed by Mr. Martin himself -- do not reflect the necessity of looking "behind the appearance to determine if there is any substance to the appearance."* For example, on December 30, 1983, Mr. Martin issued an advisory opinion on the applicability of conflict of interest rules to an employee whose

*Recently Common Cause filed a Freedom of Information Act (FOIA) request to obtain additional information about OGE's interpretation of the appearance of conflict of interest standard under Executive Order 11222. Specifically, on March 11, 1985 we filed a request for "a copy of all advisory opinions, letters, and any other written materials produced by OGE since its creation in 1979 regarding, in whole or in part, the appearance of conflict of interest under Executive Order 11222."

OGE responded that it "maintains no index or file system which identifies documents prepared by the Office which . . . relate to the appearance of conflict of interest . . ." and that our request "would entail an examination of every document which has been prepared by this Office -- a voluminous amount of records spanning thousands of files." OGE's response letter concluded that the anticipated fees for our request were "at least \$18,000." (I am attaching for the record copies of the Common Cause FOIA request and the OGE response.)

Because of this response to our FOIA request, our analysis of OGE's historical interpretation of the appearance standard for this statement relies primarily on OGE advisory opinions.

wife was a subcontractor of a firm that had assigned her a job on a project [Project 1] in which her husband, as a government employee, had a significant role. Mr. Martin wrote that even if the government employee had received a waiver from compliance with conflict of interest laws, the employee could not work on the project because of the appearance of conflict of interest. Despite the fact that a waiver is legally available only if the agency effectively determines that the employee is likely to maintain his independence, Mr. Martin found that there would be "a clear appearance of impropriety which cannot be overcome." (Emphasis added.)

Moreover, in a subsequent letter dated May 1, 1984 to the same agency counsel who wrote again to propose a new financial arrangement for the employee's wife that was intended to avoid any conflict of interest violations, Mr. Martin saw no need to look behind the appearance of impropriety to "determine whether there is any substance to the appearance." He said:

However, your present suggestion, like the grant of a waiver, would fail to deal with the problem we noted in that letter -- that is, the appearance of impropriety. Regarding that problem, it is not the nature of the financial arrangement between [the employee's wife] and [the company] that is crucial; rather it is the husband-wife relationship which gives rise to the adverse appearance -- that is, to the suggestion that [the employee] might lose his objectivity in performing his duties with regard to [the project] by reason of his wife's services (Emphasis added.)

Throughout the executive branch the appearance standard is used as the basis for prospective advice given to employees. Ethics counselors strive to prevent employees from taking any action that might create the appearance of losing impartiality

and thereby injure the reputation of the employee or the agency. In fact, some employees at the Department of Interior (when required to comply with the appearance prohibitions in Executive Order 11222 and agency-specific standard of conduct regulations) have recently complained to their ethics official that they are being held to a higher standard than the one Mr. Martin articulated in the Meese case.

To prevent employees from violating the prohibition against the appearance of conflict of interest, ethics officials frequently advise employees to divest themselves of certain holdings, recuse themselves from certain matters, or refrain from purchasing particular interests. Designated Agency Ethics Officials (DAEOs) regularly render such advice in the day-to-day performance of their duties.

An advisory opinion issued by the Department of the Interior in June 1983 illustrates this point. The question at hand was whether a husband's business, involving searching for valuable mineral deposits on the public lands and staking claims on such deposits, created a substantial appearance of conflict of interest with his wife's position in the Bureau of Land Management.

The Deputy Agency Ethics and Audit Coordinator determined that the mining claims located by the employee's husband created a substantial appearance of conflict of interest with his wife's official duties on the basis of Executive Order 11222 and Interior Department regulations implementing the Order (43 CFR §20.735-24(b)(4)). The following excerpts reflect the spirit of the advisory opinion:

The purpose of the provisions of Executive Order 11222 and 43 CFR §20.735-24(b)(4) is to prohibit federal employees from involvement in matters that give the public the impression that the federal service and public trust granted to federal employees is being misused. In my opinion, the public we serve can reasonably perceive that because of your employment, your husband may have an unfair advantage in his attempts to locate mining claims. This perception can, in my opinion, create the appearance that you are using your public office for the private gain of your spouse.

I find no evidence to indicate that you have, in fact, abused your federal service or that you have actually been involved as a federal employee in particular matters in which your spouse has a financial interest. If such an allegation were received, further investigation would be necessary. However, there is evidence of a close relationship between your duties and the kind of information your husband needs in order to pursue his attempts to locate mining claims. Also, the record shows a pattern of claims located in areas of public land for which you have related official duties. Consequently, there is an appearance of impropriety that, if substantial, is prohibited by Executive Order 11222 and 43 CFR §20.735-24(b)(4). (Emphasis added.)

Moreover, the federal courts have affirmed that disciplinary action may be based on appearance of conflicts of interest. Although Mr. Martin has indicated that the language of the Executive Order is too vague and too broad to ensure fair enforcement, the courts have not adopted this view. In Wild v. United States Dept. of Housing & Urban Dev. 692 F.2d 1129 (7th Cir. 1982), an opinion written by Judge Richard A. Posner, the court rejected petitioner's argument that the code was too vague and that it did not authorize adverse personnel action. Judge Posner stated:

We also reject Wild's argument that the code of conduct does not authorize adverse personnel action. The evident purpose of the code is to make conduct that is not necessarily forbidden by any express regulation a ground for separating an employee from HUD. It states that a HUD employee "can never have a right of tenure that transcends [sic] the public good. He can properly

be a Government employee only as long as it remains in the public interest for him to be one. Public trust and confidence in the integrity of the Government are paramount." 24 C.F.R. § 0.735-201(a). In addition, "the effective accomplishment of the Department's mission is significantly dependent upon a public image that engenders confidence in the Department's integrity. Accordingly, the avoidance of any involvement that tends to damage that image is a responsibility of exceptional importance for all employees who participate in or influence official operating determinations that affect the interests of those with whom the Department does business." 24 C.F.R. § 0.735-201(b)(1). Therefore, "If there is knowledge of any employee's involvement in or association with circumstances reasonably construed to reduce public confidence in the acts or determinations of the Department, such knowledge may be sufficient cause for the initiation of action adverse to the employee" 24 C.F.R. § 0.735-201(b)(2). (692 F.2d at 1131)

It should be recognized further that neither the Executive Order nor the regulations are criminal prohibitions, with criminal sanctions. Rather, they are administrative rules, for which flexible procedures and penalties are provided. Many ethics officials have told Common Cause that they have available and have recommended a range of adverse actions in response to violations, including letters of reprimand, warnings, one- or two-day suspensions from duty, as well as dismissal.

Finally, Mr. Martin's conclusion that developing case law supports his interpretation on the appearance standard is simply wrong. The United States Court of Appeals decision that he cites as precedent, CACI, Inc. v. United States, 719 F. 2d 1567 (1983), does not apply to the issue of disciplinary action against federal employees. The case really addressed the issue of enjoining a government contract. In fact, according to the National Journal, Mr. Martin conceded that "'personnel actions

maybe are a little different' than the contracting questions addressed in the CACI ruling." Moreover, a recent federal case, Dynalelectron Corp. v. United States 4 Cl. Ct. 424 (1984), expressly recognized the distinction between the issue of whether the appearance of impropriety warrants disciplinary action against federal employees and the government contract questions at issue in CACI. While citing CACI's holding with regard to the contract questions raised, the court in Dynalelectron stated, (in dicta), "an appearance of impropriety may warrant disciplinary action against the offending federal official."

The Appearance Rule is Necessary to Preserve Government Integrity

Executive Order 11222 and the implementing regulations that prohibit actions that "might result in, or create the appearance of . . . giving preferential treatment or . . . losing complete independence" are necessary to ensure that all of us receive even-handed, impartial judgments by public officials. These standards are necessary because a public servant should never mix the exercise of official power or influence with personal financial affairs -- whether or not anyone can demonstrate the causal relationship between the employee's financial affairs and public duties.

The reasons for this are simple and straightforward. First, mixing personal financial affairs with government business does not merely give the appearance of a conflict of interest, as Mr. Martin maintains. As Archibald Cox has said, it does not constitute a kind of tentative conclusion -- subject to further

investigation of the official's true intentions. "The appearance of wrongdoing cannot be dismissed as a misinterpretation, misperception, or misconstruction of the official's actions by those observing the official -- that can be corrected with greater information. The mixing of financial affairs and official duties is itself a wrong and is generally understood to be wrong."

As Robert G. Vaughn, professor of law at American University, wrote in Conflict-of-Interest Regulation in the Federal Executive Branch:

[I]n the usual context, to speak of the appearance of a conflict of interest is a redundancy. Conflict-of-interest principles are violated when an employee places himself in a position where a conflict exists between his private financial interests and the interests of the public he is to serve. He may not perceive the conflict, and indeed, reasonable people may doubt whether he is, in fact, in a position where he may be tempted to further his personal financial interests at the expense of his public duties. He may not do so, but he is in a position where he is tempted to do so. There is no appearance of conflict of interest in this situation; the situation of potential breach of the public trust is itself the conflict of interest. By definition, conflict of interest concerns appearances. (Emphasis added.)

Archibald Cox has highlighted the difficulty in proving or disproving causal relationships when the government official mixes official power with personal financial affairs. "Neither he nor anyone else can possibly be sure that his judgment was unaffected."

Second, apparent conflicts of interest are wrong because they undermine public confidence in the integrity of government. Even if the official were able to maintain complete impartiality of judgment, the appearance of a government official mixing

personal financial affairs and public responsibilities undermines public respect for government. The importance of avoiding appearances that create distrust in government was emphasized by Senator Strom Thurmond during consideration of the Senate Code of Ethics. He said:

There is one thing my father told me when I started out in public life. He said, "You have got to appear right as well as be right." (125 Cong. Rec. 8349 (March 21, 1977))

The sight of a government official mixing personal financial affairs and public responsibilities also sets a destructive example, inviting other government officials actually to use their offices for personal gain.

Finally, Mr. Martin's emasculating interpretation of Executive Order 11222 and implementing regulations is bad policy because it would impose an unnecessarily heavy burden on government ethics officials. Rather than flatly prohibiting any mixing of personal financial affairs and public responsibilities, Mr. Martin would require the government to demonstrate a causal relationship in every case between the employee's finances and his exercise of official duties. But as noted above, neither the employee nor anyone else can ever truly know the degree to which the employee's judgment has been affected by financial relationships or favors. These are complex and often unknowable matters that if required to be proven will seriously undermine the necessary prohibition against mixing personal finances and public duties.

In the Wild case discussed above, Judge Posner rejects petitioner's argument, raised in the context of the requirements

of the Civil Service Reform Act, that the agency should be forced to prove the detrimental effects on government of his misconduct. Judge Posner's conclusion is fully applicable to Mr. Martin's assertions. He wrote: "To prove by the methods of litigation that anything which a nonsupervisory employee did would impair the efficiency of the organization would be a daunting task, and one that would rarely be worth undertaking to remove a single employee." (692 F.2d at 1133) If Mr. Martin's interpretation is accepted, and government is required to categorically prove favoritism and influence before finding a violation of the standards of conduct, the prohibition against apparent conflicts of interests will be effectively destroyed.

In summary, Mr. Martin's interpretation of the "aspirational" nature and unenforceability of the appearance standard of the Executive Order is unique -- and wrong. Mr. Martin's interpretation flies in the face of the language of the Executive Order. Mr. Martin's interpretation stands in sharp and isolated contrast to the interpretation and enforcement of the Executive Order by DAEOs, by Inspectors General throughout the federal government, by OGE itself, by the Merit Systems Protection Board, and by the courts. Mr. Martin's interpretation of the Executive Order would make ethics enforcement a virtually impossible task and would stand as an open invitation for increased conflict of interest problems throughout the government. We urge this Committee -- which has worked so hard to guarantee that the public's business is separate from private interests -- to make sure that this dangerous doctrine does not take root.

II. Summary of Common Cause Ethics Study Results

In November 1984, Common Cause issued a report entitled, Bureaucratic Orphans: The Administration of Government Ethics Programs as Viewed by Agency Ethics Officials. (I am attaching a copy of this study to be submitted for the record.) Common Cause undertook this study as a follow-up to our participation in the legislative effort to pass the Ethics in Government Act of 1978. We were interested to learn how ethics programs are being implemented within the executive branch. In addition, frequent reports concerning allegations of use of public office for private gain, acceptance of gifts, and incomplete reporting of financial holdings led us to conclude this was an appropriate time for such an evaluation. We focused on the designated agency ethics officials, or DAEOs, since they are charged with front-line responsibility in the agencies for providing ethics education and preventing conflicts of interest.

The findings of that study are based on responses to a questionnaire completed by agency ethics officials from 50 agencies. As we noted in the report, although the ethics officials' views and self-evaluations reflect only part of the picture, they provide a useful starting point for understanding and evaluating the efforts being made at the agency level to ensure that ethical standards are upheld by government officials.

The study found great variance among agencies in the provision of ethics-related services. Although the DAEOs' reports suggest that a number of agencies provide valuable training and

education and perform systematic review of financial disclosure reports in the face of serious resource constraints, Common Cause found a number of areas of concern:

- 1) Great variance exists among agencies in their commitment to providing ethics-related services.
- 2) Agency ethics officials tend to view their ethics duties narrowly, focusing mainly on financial reporting requirements and paying less attention to ethics education.
- 3) In most agencies the visibility of ethics programs is low. They do not have a separate identity, but tend to be operated as an adjunct to the office of general counsel or personnel.

Data from the study also suggest the following conclusions:

- o Most designated agency ethics officials spend less than 15 percent of their time on ethics responsibilities.
- o Many DAEOs do not maintain a record of situations that have resulted in noncompliance with ethics laws and regulations, as required by the Ethics in Government Act.
- o Communication between ethics officials and offices of Inspectors General appears to be weak in most agencies.

We believe the areas of concern identified in our report flow from insufficient commitment to vigorous ethics education and enforcement from high-level officials in the White House, in the Office of Government Ethics, and in the agencies. This results in low visibility for many ethics programs, which hinders their effectiveness.

This situation is only made worse by Mr. Martin's recent incorrect reinterpretation of the Executive Order. If DAEOs are to succeed in their efforts to educate employees about their ethical obligations and to prevent conflicts of interest, greater support and direction from the top are essential.

As a result of the study, Common Cause also suggests a number of other recommendations. Among these are the following:

- 1) Enabling DAEOs to spend a greater amount of time on ethics responsibilities to improve the quality of ethics programs and increase their identity and independence within the agencies;
- 2) Strengthening regular ethics training on the broad range of standards of conduct issues and improving the quality of written material used by DAEOs for ethics education;
- 3) Making the review of financial disclosure forms and procedures for determining conflicts of interest more systematic in order to reduce the potential for financial conflicts;
- 4) Increasing monitoring of compliance with post-employment restrictions; and
- 5) Enabling the Office of Government Ethics to provide more training sessions for agency ethics officials and to conduct more audits of agency ethics programs.

Common Cause believes that data from this preliminary report have begun to answer some questions about how ethics programs are being implemented by agency ethics officials. We look forward to continued work and study in this area.

III. Implementation of Financial Disclosure Requirements

At the heart of the Ethics in Government Act of 1978 is the requirement for public financial disclosure for executive branch employees GS-16 and above. After six years of experience under the Act, we firmly conclude that the disclosure provisions have proved to be reasonable, balanced, and to have worked well.

On the average 11,000 disclosure forms are filed yearly with little commotion. It is clear that, for the most part, disclosure requirements have become an accepted part of public service.

Certainly there is no credible evidence that public financial disclosure requirements have in any significant way discouraged otherwise willing individuals from entering government service or caused quality personnel to leave federal service.

During legislative consideration of the Ethics in Government Act, Common Cause worked vigorously to balance the privacy rights of the public official against the disclosure necessary to guard against conflict of interest. For example, we strongly opposed efforts to require disclosure of income tax returns and have consistently opposed disclosure of net worth.

But while we strongly fought against requiring too much disclosure, we will fight just as hard to prevent too little disclosure. We believe that Congress should continue to resist the weakening of the public disclosure requirements as has been advocated by some Reagan Administration officials. Any cutting back in public disclosure would severely undermine the Act to the detriment of the public trust.

It is also important that the existing statutory public disclosure provisions are carefully and vigorously implemented by OGE and ethics officials in the agencies. DAEs have responsibility for overseeing the filing and review of disclosure reports for all covered officials in their respective agencies. OGE, in addition to overall responsibility for the financial disclosure system, handles public reports for all presidential appointees upon their entry into government, and for top personnel in the White House and all cabinet members throughout their government service. Moreover, both OGE and DAEs are responsible for

reviewing these reports to ensure that possible conflict of interest situations are identified and resolved.

View of the agencies. From our survey of 50 agency ethics officials, we believe many agencies are doing a reasonably good job of notifying employees of their obligation to file reports and collecting them in a timely fashion.

Many agencies also seem to do a fairly good job in resolving clear conflicts of interest that are brought to the attention of ethics officials. The study leads us to be concerned, however, about whether agencies are effectively identifying conflicts of interest. A process for making determinations of conflicts of interest is crucial to the ultimate success of an agency's ethics program: the more thorough and comprehensive the procedures used, the more likely that potential conflicts will be identified and resolved.

A small number of our respondents report that they make determinations of conflict by comparing an employee's holdings with a list of agency contractors or grantees. Some refer to published reference sources, such as Moody's or Standard and Poor's, and others use a copy of the employee's position description. Yet, in most agencies we found that conflict determinations are not founded on this type of objective information, but rather on the subjective judgment of the DAEO, supervisor, or legal staff. In our view, in such cases it appears that the process is ad hoc, raising questions about the comprehensiveness and consistency of the decisions that are made. Only one agency in our sample (the Environmental Protection Agency) had developed

objective and comprehensive standard operating procedures for review of disclosure reports.

View of OGE. Similarly, OGE is responsible for the collection and review of public disclosure reports for the highest level members of the executive branch. OGE is also required by the Ethics in Government Act to monitor and investigate compliance with the public financial disclosure requirements.

Since our study focused solely on how DAEOs perform their duties, we do not have systematic data on which to evaluate OGE. However, public controversies about the financial activities of such high-level officials as Central Intelligence Agency director William J. Casey, top White House aide Michael Deaver, and Secretary of the Navy John Lehman, for example, raise questions about OGE's review and monitoring in this important area.

Specifically, it is useful to examine Mr. Martin's response to a written question from Senator Levin regarding whether OGE or the DAEOs keep records of violations of conflict of interest requirements or records of corrective actions taken in response to such violations. Mr. Martin did not respond to Senator Levin's question of whether OGE or DAEOs keep records of violations. He did admit that calendar year 1981 was the last year for which OGE compiled specific data regarding corrective action directed by OGE.

This leads us to question how OGE is fulfilling its statutory mandate to monitor and investigate compliance with public financial reporting requirements. It also leads us to question what kind of example OGE is setting for DAEOs, who are mandated

by the Ethics in Government Act to maintain a record of situations that have resulted in noncompliance with ethics laws. (Of the 50 DAEOS responding to our study, 18 do not maintain such records.)

Recommendations. As noted above, Common Cause suggests that the DAEOS' review of financial disclosure forms and procedures for determining conflicts of interest be made more systematic. OGE should develop model procedures for determining conflicts and emphasize this area in its ethics training. Such efforts would be particularly useful to those ethics officials with limited experience in this area, but would also be useful for experienced DAEOS who do not now rely on objective procedures.

Further, a system of random audits of financial disclosure reports could help reduce the potential for financial conflicts in the same way the Internal Revenue Service random audit system encourages compliance with income tax reporting requirements. Such audits could be conducted by OGE, agency Inspectors General, the General Accounting Office, or an outside auditing firm. Only a small number of reports would need to be audited each year for the system to be effective -- the possibility of a random audit would clearly increase compliance.

Most important, OGE must set a high standard for agency ethics officials to follow. As long as questions are raised about OGE's own record-keeping and commitment and ability to enforce vigorously and consistently the public financial disclosure requirements for the highest level officials, there is no reason to expect DAEOS to do better.

Confidential Disclosure

In addition to the public disclosure system, in most agencies all employees between the GS-13 and GS-16 pay levels, and certain employees below the GS-13 level, file confidential financial disclosure statements.

We are aware of opinions from the Department of Justice and the General Accounting Office (GAO) that question the legal basis for this system. According to these opinions, the financial disclosure provisions contained in the Ethics in Government Act of 1978 supersede the confidential system set forth in Executive Order 11222. We are also aware of GAO's position that a clarification of the legality of this reporting requirement is essential for GAO to proceed with its audits of agency confidential financial disclosure systems.

The Justice Department originally raised the question of the system's legal basis in 1979 and reiterated its position in 1983, but the Office of Government Ethics has not yet acted to resolve this situation. We believe OGE and the White House should address this issue immediately.

IV. Revolving Door: Post-Employment Restrictions

Title V of the Ethics in Government Act contains restrictions on post-government employment for certain federal employees. These provisions impose three types of prohibitions on lobbying activities. Violations of all three are subject to criminal penalties under 18 USC §207.

First, former officials are forever barred from representing anyone other than the United States before a federal court or agency with respect to a "particular matter involving a specific party or parties" in which they ever participated "personally and substantially" as government employees.

Second, former employees who had "official responsibility" for particular matters are barred for a period of two years from representing outside parties on such matters before the federal government or courts. This restriction applies to particular matters which were under a former official's responsibility during his or her final year in the responsible position.

Third, the Ethics in Government Act imposed an additional bar on the activities of "senior employees" (executive personnel plus designated personnel at the GS-17 and GS-18 levels who have decisionmaking or supervisory responsibility). These officials are subject to a one-year "quarantine" that prohibits any communication with their former agency on behalf of anyone other than the United States with the intent to influence on any matter, whether or not the former official participated in the matter.

These restrictions do not restrict where a former government official can go to work. Rather, they restrict certain post-federal employment activities in order to prevent the former official from using contacts and knowledge gained from public service to influence government decisions on behalf of his or her private sector employer.

Data from the recent Common Cause report indicate that most ethics officials provide written materials explaining these prohibitions to their departing employees and that many agencies conduct exit interviews to ensure that departing officials understand what they can and cannot do in their post-government employment.

Although DAEOs identified post-employment conflicts as an important ethics problem, our study also revealed that monitoring of compliance with post-employment restrictions tends to be limited or non-existent in many agencies.

Although we believe that the post-employment bars help deal with the revolving door problem, we do not really know how well they are working. This is largely due to limited monitoring of compliance with these restrictions and therefore limited enforcement. Part of the problem is lack of information -- ethics officials do not know where former employees go to work when they leave the government or whether they are in contact with their former agency. The other part of the problem is time, resources, and commitment to enforcing compliance with the prohibitions.

Some ethics officials attempt to monitor formal appearances by former employees before their agencies, but these systems are not air-tight, since they rely on the former employee registering with the agency each time he or she returns. Informal contacts are sometimes flagged by current government employees, who notify their ethics officials when they get a call or visit from a former colleague.

Recommendations. First, Common Cause believes that OGE should develop a model for agencies to use in monitoring these post-employment restrictions. The model should include a formal process for notifying and educating those leaving the government of these restrictions, a process for enforcing and monitoring the restrictions on appearing before the agency, and a procedure for enforcing the one-year ban, including circulating periodically within the agency a list of all former employees covered by the one-year ban.

Second, those senior employees covered by the one-year ban should be required to disclose with whom they are going to work when leaving government. This list could also be circulated at the agency and could substantially facilitate enforcement of this important restriction.

Third, Congress should ask the General Accounting Office to conduct a follow-up study of its 1978 report, "What Rules Should Apply to Post-Federal Employment and How Should They be Enforced?" (August 28, 1978). This study could serve as a guide for this Committee and the Congress for further steps that should be taken in this area.

Revolving Door Problems in Procurement and Contracting

In recent months we have seen increasing documentation of a disturbing and serious revolving door problem concerning those involved in contracting and procurement. The problem is not only what people do after they leave government, but what they do while in government in expectation of future employment.

Section 208 of Chapter 18 prohibits government employees from negotiating for future employment with private enterprises that have a financial interest in matters in which the employees are officially participating, and Executive Order 11222 contains prohibitions on activities that appear to pose a conflict of interest. However, we agree with the growing concern that more needs to be done to prevent government employees involved in contracting and procurement from giving or appearing to give preferential treatment to a potential future employer.

As Dr. Gordon Adams, Director of the Defense Budget Project, recently stated in testimony before the Senate Armed Services Subcommittee on Defense Acquisition, "[t]he Department of Defense should not be a personnel agency for its contractors: its job is to provide for our national security." Yet in 1983 over 2,100 people left DoD for jobs with defense contractors or moved from jobs with contractors to DoD employment. And while this problem is clearly most severe in the defense arena, which gives 80 percent of all government contracts, there is no reason to believe that it is limited to DoD alone.

The result of this situation is threefold. First, the morale of public employees is dampened when they see their former colleagues take on jobs with the very contractors whose work they oversaw or whose products they purchased while they worked in government. Second, public confidence in the integrity of the public procurement process is threatened. Third, many knowledgeable observers in and out of government see a connection between

outrageous overpricing by Pentagon contractors and the revolving door.

Common Cause applauds the attention now being focused on legislative solutions to this critical problem. We believe that further legislation is needed in this area to remove the potential for procurement personnel to treat contractors favorably in order to secure employment with that contractor in the future. We believe this problem should be dealt with during the 99th Congress.

Mr. Chairman, I would again like to thank this Committee for conducting this important oversight hearing. The issues that are being examined are crucial and the stakes are enormous. The basic question is whether the fundamental standards of conduct for public officials that have been in effect for decades are to continue to be correctly applied or simply abandoned. The outcome will determine whether public service continues to be treated as a public trust.

We stand ready to work with this Committee in any way that we can to help ensure that the current ethics laws and regulations are correctly applied and vigorously enforced.

Senator COHEN. The final witnesses today include a panel of witnesses from the Defense Department and the GAO. Testifying on behalf of the GAO is Rosslyn Kleeman, Associate Director, General Government Division.

The Department of Defense is represented by Alvin Tucker, Deputy Assistant Inspector for Auditing, accompanied by David Cooke, of the Office of the Secretary General of Defense.

Before you begin, I would like to just make an observation. Many times we find the executive branch coming before Congress and saying, "Boy, these guys really don't live in the real world, and they pass these sanctimonious laws but don't understand what the full implication is for those of us who have to go out and hire people. Aren't they setting themselves up as some sort of moral paragons of virtue up here behind this dais?"

That really isn't the case. I think the difference is that we have to go out and run for public office. If you are concerned about examination, let me tell you, it is a wonderful experience to go out and get examined by your opponents, by your political adversaries, and by the press. That is the difference. We have to go through this. We are held accountable on a daily basis, and people who work for the executive branch aren't. They are never seen for the most part. They work in many of these buildings here, and no one knows much about them.

So that is why the standards are imposed, because those in the executive branch certainly have a coequal share of power, perhaps much more so in the executive decisionmaking process than we do as legislators.

So what we are trying to do is to say that we are ensuring the public, who never gets a chance to see all those folks at work before the public, that certain standards are being adhered to.

I sometimes feel uncomfortable. We are looking down like a group of judges, totally untainted by reality, as to what you have to deal with, but we are up there and we have to be accountable to people, unlike most members of the executive branch.

With that, we will start with Ms. Kleeman.

TESTIMONY OF ROSSLYN S. KLEEMAN, ASSOCIATE DIRECTOR, GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY L. NYE STEVENS, GROUP DIRECTOR, GENERAL GOVERNMENT DIVISION; AND ALVIN TUCKER, DEPUTY ASSISTANT INSPECTOR GENERAL FOR AUDITING, DEPARTMENT OF DEFENSE, ACCOMPANIED BY DAVID O. COOKE, DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR ADMINISTRATION

Ms. KLEEMAN. Thank you, Mr. Chairman and Senator Levin. We are pleased to be here today to discuss, as you asked, a statutory interpretation that invalidates financial disclosure requirements as they affect a large portion of the Federal Government's work force.

In August 1983, we became aware of certain Department of Justice legal opinions that severely affected the enforcement of financial reporting requirements in several agencies. In essence, these opinions indicated that agency financial disclosure systems could not be validly applied to the majority of the executive branch work

force those who occupy positions below grade 16, or below the Senior Executive Service.

Attached to my statement is an August 30, 1983 letter to the chairman of the Subcommittee on Human Resources of the House Post Office and Civil Service Committee. I'd like to submit that for the record and tell you that the letter notes that section 207(C) of the Ethics in Government Act had been interpreted by the Department of Justice as superseding financial disclosure requirements in other statutes, many of them specific to individual programs or agencies.

The Ethics in Government Act applies only to Federal employees in the Senior Executive Service, or grade 16 and above. But section 207(A) of the act authorized the President to issue an Executive order extending the disclosure requirements to other employees; however, when we wrote the letter, no Executive order had yet been issued.

The effect of this situation was that there were no legally enforceable financial disclosure requirements for the vast majority of the Federal work force. We, thus, had to suspend work that we had ongoing and some planned work on financial disclosure systems in two bureaus of the Department of Interior. And we have initiated no new work in this area.

As Mr. Martin acknowledged, the situation described in the August 1983 letter still prevails. The President has not issued an Executive order extending financial disclosure requirements to executive branch employees not covered by the law, even though executive branch officials have known of this problem since 1980.

Our view remains the same as we expressed it 18 months ago, that, ultimately, a legislative solution to the problem will be required.

The letter I've submitted for the record provides a brief analysis of four possible options for resolving the problem. We recognize that each of the options involves some disadvantages and are not prepared to make a specific recommendation on a solution at this time.

This concludes my statement, Mr. Chairman. I will be glad to answer any questions.

[The letter referred to follows:]



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

GENERAL GOVERNMENT
DIVISION

AUG 30 1983

B-103987

The Honorable Donald Joseph Albosta
Chairman, Subcommittee on Human
Resources
Committee on Post Office
and Civil Service
House of Representatives

Dear Mr. Chairman:

Subject: Options for Amending the Ethics in Government Act

This letter is in response to an August 22, 1983 request from your office for a quick analysis of problems arising from an interpretation of the provision in the Ethics in Government Act that supersedes financial disclosure requirements under other laws. Department of Justice opinions issued to the Environmental Protection Agency in April of 1980 and to the Office of Government Ethics in February of 1983 indicate that presently Federal employees at the GS-15 grade level and below (with few exceptions) are not subject to financial disclosure requirements. Those opinions are based on the Department of Justice interpretation of sections 207(a) and (c) of the Ethics in Government Act.

Section 207(c), Title II of the Ethics in Government Act (Public Law 95-521) states:

The provisions of this title requiring the reporting of information shall supersede any general requirement under any other provision of law or regulation with respect to the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest.

On April 11, 1980 the Department of Justice concluded that this section of the Act displaced the general financial reporting

requirement provisions of four environmental protection laws.^{1/} Other Federal agencies--the Department of the Interior, for example--have similar reporting requirements affected by this Justice opinion.

Section 207(a) Title II of the Ethics in Government Act, however, states:

The President may require officers and employees in the executive branch (including the United States Postal Service and members of the uniformed services) not covered by this title to submit confidential reports in such form as is required by this title.

The Department of Justice in a memorandum to the Acting Director of the Office of Government Ethics on February 10, 1983 concluded that employee confidential financial disclosure reports ordered by the President should include the same information required of higher level employees under Title II of the Ethics Act.

Because the President has not yet exercised his authority to require confidential financial disclosure under 207(a), these Department of Justice opinions mean that there is currently no enforceable requirement for public or confidential financial disclosure by Federal employees below the GS-16 grade level. The statutory prohibitions on the financial interests of specific groups of Federal employees, however, still exist. Therefore, Federal officials responsible for agency ethics programs have been left with duties to enforce statutory provisions that prohibit certain financial interests employees may hold, but these officials no longer have a legal basis for requiring the necessary public or confidential disclosure reporting by employees below the GS-16 grade level in order to enforce these prohibitions.

^{1/} Section 26(e) of the Toxic Substance Control Act, 15 U.S.C. 2625(e)

Section 1007 of the Solid Waste Disposal Act, 42 U.S.C. 6906

Section 318 of the Clean Air Act, 42 U.S.C. 7618

Section 12 of the Environmental Research, Development and Demonstration Authorization Act of 1978, Public Law 95-155, 91 Stat. 1263

Monitoring of Implementation Curtailed

Our review of the financial disclosure systems operated by Federal agencies has been curtailed pending a resolution of the dilemma confronting agency officials responsible for administering and operating financial disclosure systems.

Without a valid reporting requirement in place, we are not in a position to report positive or negative audit results on systems designed to process financial disclosure statements, insofar as those systems purport to address employees at the GS-15 grade level or below. If we report positively on an agency's design and implementation of such, we in essence will be endorsing an unauthorized system. If we report negative findings, the agency could argue that it is not legally obligated to require financial disclosure reporting, public as well as confidential, from its employees below the GS-16 grade level.

Three of our current audits of Federal financial disclosure systems have been affected by the Justice opinions. We have asked the Congressional requestor of two audits for permission (1) to close one audit with a staff briefing and (2) to suspend audit work at another agency. The third audit report, with a number of negative findings, has been delayed because of this issue. These jobs involve an assessment of the agencies' financial disclosure systems for Federal employees at the GS-16 and above grade level as well as employees below the GS-16 grade level.

Our past audits reveal that financial disclosure for employees at the GS-16 and above grade level, which continues to be in effect, is a small segment of agencies' overall financial disclosure systems. For example, at the Department of the Interior's Minerals Management Service, 14 employees at the GS-16 and above grade level filed the public disclosure form SF-278 required by the Act. Another 1,300 employees below the GS-16 grade level filed other confidential or public disclosure statements. Only the 14 employees at the GS-16 and above grade level are currently required to file disclosure statements under the Ethics in Government Act.

Options for Resolving the Problem

There are several ways to resolve this problem. GAO has not yet had time to analyze thoroughly all of the implications of the alternatives, but some pros and cons are presented below:

1. The President could issue a new executive order under Section 207(a). This would bring confidential reporting requirements for employees below the GS-16 grade level into conformance with reporting requirements for higher grades prescribed in Title II of the Ethics in Government Act.

Pros:

- This can be done under existing authority, with no action required by Congress.
- Work has been going on for many months within the executive branch to do this.

Cons:

- Because Section 207(a) requires reporting in the same form as Title II, a new executive order would still disrupt the reporting requirements in several agencies which now ask for information relevant to agency missions but not covered by Title II.
- Executive branch officials have known of this problem for more than three years, and the lack of a decision may indicate a reluctance to pursue this option.

2. Amend the Ethics in Government Act by removing Section 207(c).

Pros:

- This would be a simple solution from a legislative perspective.
- Existing reporting practices would remain intact for employees at the GS-15 grade level and below.

Cons:

- Employees in grades GS-16 and above would have to file not only the Standard Form 278 required by the Ethics in Government Act, but also other forms under other acts, reverting to the redundancy and excessive paperwork that characterized the period before passage of the Ethics in Government Act.
- This would directly violate a primary aim of the Act, which was to make reporting requirements for high level employees uniform among agencies.
- It should be noted that legislation has already passed the Senate without a provision for removing Section 207(c). Reconsideration may involve delay.

3. Amend the Ethics in Government Act by modifying Section 207(c) to make it applicable only to GS-16's and above (more specifically, to those enumerated in Section 201(f)).

Pros:

- Since only an introductory phrase to Section 207(c) would need to be added, this is a simple solution.
- Existing reporting requirements would remain intact for employees at the GS-15 grade level and below.
- This would essentially ratify the commonly held understanding of Section 207(c), that it superseded only the duplicative requirements affecting highest-level employees, and not those at GS-15 and below.
- GAO and other agencies would have a valid basis for reviewing disclosure systems in operation.

Cons:

- This would partially mitigate one purpose of the Act, which was to make reporting requirements more consistent for employees across the board; some employees at the GS-15 grade level and below will have to file two or more statements.
- Reconsideration to modify Section 207(c) may involve delay since legislation has already passed the Senate without this change.

4. Amend the Act to give Federal agencies administrative authority to require confidential financial disclosure to the extent necessary to enforce statutory prohibitions and otherwise monitor the financial interests of their employees.

Pros:

- There would be minimal disruption of operating systems.
- The Office of Government Ethics could monitor agency use of the authority to assure that it is not extended too broadly.

--GAO and the agencies would have a valid basis for reviewing disclosure systems in operation.

--As a temporary expedient, it could buy time for a more comprehensive review of the problem. In this regard, the authority could be granted for a limited period.

Cons:

--Same as alternative 3.

--If adopted as a temporary expedient, it could result in a period of confusion and hesitation.

While each of these options has disadvantages, we are convinced that a very real need exists for providing agencies with a defensible mechanism for requiring and monitoring financial disclosure statements of a broader range of their employees than are currently covered by the Ethics in Government Act. Ultimately, we believe Congress will have to resolve this problem through legislation. The fact that the Ethics in Government Act is presently under consideration by your Subcommittee offers an opportunity to resolve the problem before it becomes even more serious.

While your request for an immediate reply has not enabled us to do a complete analysis, we trust that this is responsive to your request. We would be pleased to do further work on this subject if you would find that helpful.

Sincerely yours,

W. J. Anderson

William J. Anderson
Director

Senator COHEN. Is it GAO's position that the Justice Department's opinions do in fact totally invalidate the confidential financial disclosures?

Ms. KLEEMAN. Mr. Stevens is here with me. He did the work on disclosure.

Mr. STEVENS. To the extent that the requirements antedate or predate the Ethics in Government Act of 1978, yes, that's correct. It also invalidates the financial reporting requirements of Executive Order 11222, which was, of course, promulgated several years before the Ethics in Government Act.

Senator COHEN. Couldn't the agency simply change their financial disclosure forms to permit the same information required in the public disclosure statement?

Mr. STEVENS. If there were a new Executive order authorizing that, that would resolve the legal problem.

Senator COHEN. Do you believe these confidential reports are necessary and useful in detecting conflicts of interest?

Ms. KLEEMAN. Yes. We found them very useful in our work.

Senator COHEN. Mr. Stevens?

Mr. STEVENS. Yes, we do. There's really no other way that executive branch managers and ethics officials have of carrying out their responsibilities for preventing conflicts of interest and appearances of conflicts of interest.

The only alternative to getting information from employees in advance is to wait until something appears in the press, or there's been an allegation of actual misconduct after the fact.

Senator COHEN. Don't you find it somewhat disturbing that the Department of Justice has put on notice that all of its employees, its attorneys, that they don't have to file anything any more?

Ms. KLEEMAN. The agencies we've talked to certainly do, yes.

Senator COHEN. Tell me about your survey. You have conducted a survey with agency officials. What is their general reaction? What are the most common problems they are presented with in applying the ethics laws?

Ms. KLEEMAN. I think they are all concerned about Mr. Martin's new definition relating to appearance. Some of the other things they mentioned were that they occasionally have problems interpreting some of the forms, that some of the forms are very complex. They also said they don't have very large staffs and the ethics officers are often—in fact, are almost always—just part-time. This is just one of their many duties.

And they mention that it is particularly difficult now reviewing financial disclosure forms; certainly, with the many conglomerates we have today, it often is difficult to recognize when there might be a conflict of interest.

I know, in some GAO work that we did previously, we had sometimes to use as many as 17 different sources to get at a possibility of conflict when there are conglomerates involved.

I think the other thing the people we talked to mentioned, was that they had very little, if any, time for followup after people leave the Government. They had no time to work on postemployment problems.

Senator COHEN. They don't even have time when they come in. They're a year behind from the time they come through the door,

and they have little interest and no ability to monitor once they leave the door.

Ms. KLEEMAN. They don't seem to know quite how to track people after they've left the Government.

Senator COHEN. What about their ability to deal with the appearance problem? Is it their view that Mr. Martin's interpretation is a change in policy?

Ms. KLEEMAN. Yes. No one that we talked to agreed with Mr. Martin's interpretation. They're all using their agency standards and they are still abiding by their agency regulations, and they take the appearance of conflict very seriously. I think we had one good example of what has been happening when we talked to people at the General Services Administration. We have a letter from the new Acting Administrator, Mr. Ink, who just took over at GSA. I asked him, when we found this letter, and I'd be glad to submit this letter for the record if you'd like...I called him and said, "What made you write a letter about employee standards of conduct just a few days after you took over as Acting Administrator of GSA? Was this one of your most difficult problems?"¹

He said his ethics officer had told him that there was great concern about Mr. Martin's interpretation so he felt it necessary to issue a letter to show that they took appearance very seriously.

Senator COHEN. Did you find that there is a distinction between the agency heads, as opposed to the agency ethics officers? In other words, suppose the ethics officer says, "I think this is a misinterpretation of the rule and I intend to apply an appearance standard." The agency head says, "Wait a minute. Mr. Martin says that's not the rule so don't apply that standard."

Is there a difference between the interpretations of the agency head and the ethics agency official?

Ms. KLEEMAN. The people we talked to informally in the survey said they were just uncertain about what might happen. Nothing specific had come up with the people we talked to. However, right after the Meese confirmation hearings, I got quite a few calls from people who had something to do with ethics—it's not always the agency ethics officer—who expressed great concern. They used the expression, "There was a climate of fear about what might happen."

This was several people who were very concerned about what would happen, what kind of support they might get from the head of the agency if the head of the Office of Government Ethics was using a different standard from the one the agency had used, and which they intended still to use.

Senator COHEN. You get actually two levels of discontent. You've got one potential level between the ethics officer within the agency and the agency head. Assuming you can reconcile those two situations, then you have another one; namely, the agency head who says: "We are going to apply the appearance standard," coming into conflict with the Ethics Office itself.

Ms. KLEEMAN. There's an awful lot of confusion and uncertainty. The people we talked to for the record were a little more reluctant

¹ See p. 308.

to come out with anything very strong. But people who took the trouble to call me to express their fears, I think, represent a good share of the population.

Senator COHEN. Thank you very much.

Mr. Tucker.

Mr. TUCKER. Thank you, Mr. Chairman. I would like to submit my statement and make a short statement. I am pleased to be here today to talk about our work in two areas of conflict-of-interest reporting and disclosure. The first is our audit report on the procedures and controls over disclosure statements for current employees. It was issued in late 1984.

The audit specifically looked at the adequacy of Defense regulations implementing the Ethics in Government Act. It also examined the controls put in place to ensure timely and complete filing of the statements, as well as the controls developed to preclude the potential for apparent conflicts of interest.

Mr. Chairman, during fiscal year 1983, about 36,000 DOD civilian and military personnel filed financial disclosure statements. Our audit reviewed a total of 1,256 such statements filed that year by Procurement and Project Management officials at 22 locations. We concluded that, in most cases, ethics counselors did a good job in reviewing the statements they received; however, there was room for improvement in the administrative control over who was required to file, and when the statements were due. Specifically, we found inconsistencies between Procurement Offices as to which officials should file statements.

In some cases, individuals who did not file statements had duties and responsibilities similar to people in other offices who were required to submit disclosure statements.

We found other instances where, although the official description of the person's duties clearly specified a disclosure statement was required, no such statement had been submitted.

As to the time of submissions, we found that people newly appointed, mainly moving from one Government job into another Government job that required a disclosure statement, often were not asked to prepare the statement before commencing their new duties. Instead, their supervisors and ethics counselor waited until the annual statement became due, usually 11 months later, before requiring a submission. I want to emphasize that, in the main, these problems related to employees in grades GS-13 through GS-15, and their military equivalents. Requirements under the act for senior officials, flag officers, and appointed officials are much better defined as to who should file and when they should file. As a result, we found few problems in administrative controls over filing for these senior officials.

The reasons for the problems found in the submission of less senior officials, we attributed to less than comprehensive and definitive guidance on the policies, procedures, and responsibilities associated with the Financial Disclosure Program.

Therefore, the report recommended specific provisions to the DOD directive directing the program. The recommended provisions will strengthen the role of Ethics Counselors and Personnel Officers in determining who should file statements and in reviewing their submissions. The changes will also better define the need for

disclosure by those participating in or influencing final decisions made by others. The Office of the General Counsel for the Department of Defense concurs in this recommendation.

The second area we have looked into concerns the disclosure by former government officials working for Defense contractors. This work was done at the request of then Senator Percy, who asked the Inspector General to answer 10 questions about the accuracy, completeness and timeliness of disclosure statements made by former DOD officials in compliance with Public Law 91-121. At the same time, Senator Percy asked the General Accounting Office to do an indepth analysis of individual submissions. The Inspector General replied to Senator Percy by letter on September 14, 1984.

The law requires former military and DOD civilian employees to report their employment by Defense contractors for a period of 3 years after separation from the Department. In 1983, 2,249 such statements were filed with the Department.

In order to respond to Senator Percy, we reviewed DOD's implementing directive, interviewed appropriate officials and examined 132 forms submitted by former employees who worked for large Defense contractors over the 3-year period, 1981-83. These were people who were at the Department in 1980 and submitted their first statement in 1981.

In response to Senator Percy's questions, we concluded that:

The reporting form designated and designed by DOD quite closely follows the wording of the law.

- the Department makes a determined effort to notify retired and departing military and civilians of the reporting requirements in the law.
- annually, the Department notifies large Defense contractors to remind their former DOD employees of the reporting requirements under the law.
- the data requested on the form is generally filled in and provided on time by those who submit the information. However, sometimes the answers are incomplete or insufficient to detect potential conflicts of interest.
- there is no mechanism in the Department to monitor whether individuals comply with the law.
- the submissions are reviewed by military personnel centers, civilian personnel offices, and accounting finance centers, depending upon the practice of the military department for whom the employee previously worked. In the Navy and the Defense Logistics Agency, the statements are also reviewed by the General Counsel's Office.
- there are no procedures in effect to verify the accuracy or completeness of the data submitted by the individuals.
- there were no instances where violations of the reporting requirements were identified by the Department.

Finally, Mr. Chairman, we recommended that the threshold salary under the law be raised from \$15,000 to a level more likely to indicate a position of responsibility in today's marketplace. We also suggested mandatory reviews of the individual submissions to determine if the information provided indicates a potential conflict

of interest. The Office of the General Counsel agreed with these recommendations also.

As to future effort in these two areas, we plan to carefully review the revisions agreed to by the General Counsel's Office. In response to our December 1984 report, I am told the revised directive is almost ready to be circulated for comment within the Department.

The General Counsel also agreed, as the result of our work for Senator Percy, to assist in making some revisions to the DOD directive governing the forms required of postemployment reporting by former officials. I am told the new directive will require more information about a person's specific duties during and after Government employment. It will also require mandated reviews of the data submitted. Again, we will carefully review this revised directive when it is circulated for comment.

As to future audit work, we will defer to the General Accounting Office, which is continuing its review of the accuracy of specific information provided by former employees of the Department.

Mr. Chairman, that's the end of my statement. I will be happy to answer any questions.

Senator COHEN. Mr. Tucker, in your written statement you indicated that your audit of the financial disclosure filing system revealed that 71 percent of the newly appointed personnel had not filed their initial financial disclosure statements for up to 11 months.

Mr. TUCKER. Yes, sir.

Senator COHEN. Seventy-one percent?

Mr. TUCKER. Seventy-one percent, that was what we found.

Senator COHEN. Isn't that a rather extraordinary length of time to let it lapse?

Mr. TUCKER. Yes. We attributed it to the fact that the officials who were requiring the form were lax, waiting for the annual date of submission so they could get all the forms at once. They were not doing it as they were required to do. They should have been getting the forms from the individual when he or she was appointed to the position.

Senator COHEN. Your audit also found that ethics counselors at two naval systems commands weren't receiving all the financial disclosure statements in these cases. Was any review of the financial disclosure statements conducted by anyone?

Mr. TUCKER. In the examples you referred to, the personnel did not report any financial holdings or interest on their disclosure statements. These were negative statements and the employees supervisors retained their statements in their files. In other words, they weren't submitted to anybody and they weren't reviewed by anybody.

Senator COHEN. Mr. Tucker, there's been a lot of comment about the "revolving door" employment opportunities of former Federal employees. Does your office, the Inspector General's Office of DOD, monitor those employment contracts?

Mr. TUCKER. No, sir. Only if we are advised either through hotline complaints or through the ethics offices within the Department of potential abuses. Then we will investigate any instance that's brought to our attention.

Senator COHEN. Have you had cases brought to your attention through the hotline?

Mr. TUCKER. Yes, sir, we have.

Senator COHEN. Could you give me an example of the kind of cases you have?

Mr. TUCKER. Yes, sir, I'd be happy to. We had one known conviction, sir. An Army captain and an Army civilian were responsible for developing a computer system to be used in updating Army personnel files. The contract was let to the General Research Corp., a northern Virginia company, to develop the system. After the contract was awarded the Army captain and civilian went to work for that corporation. GRC pleaded guilty in this case to a violation of conflict-of-interest statutes and they were fined. There was no action taken against the Army captain or civilian employee.

Senator COHEN. How much was the fine, just by way of mention?

Mr. TUCKER. I'd have to supply that for the record, sir, I don't know.¹ In the case of the Air Force, an Air Force captain was employed by an Air Force plant representative and was directly involved in the negotiation of overhead rates for a large military weapons systems. The captain, during the course of these negotiations, was employed by the contractor where he was tasked to conduct overhead discussions with the Air Force in the same contract. However, the United States attorney declined prosecution in this case.

Senator COHEN. In your discussion of the work that you did for Senator Percy, I think you mentioned that the form that they currently use should be made more effective in terms of post-employment opportunities. What did you mean by that? How could the form be more effective?

Mr. TUCKER. The form is very brief and if you satisfy the requirement of the form by simply naming the activity that you work for in the military without a description of the duties or a description of the duties that you have with your current employer, it's very difficult for someone to evaluate whether your prior duties and your current duties put you in the position of a conflict of interest.

Senator COHEN. I'm troubled by one of the findings that you made as a result of the review of reports that are filed by former DOD employees. You found that the Army and the Air Force reviewed the forms only for completeness. They don't analyze them for any possible conflict of interest.

Mr. TUCKER. Yes, sir, that's correct.

Senator COHEN. So, just send in the form. Are all the lines filled in?

Mr. TUCKER. Yes, sir. If all the information was filled in on the form and the person fell within the 3-year period, then the form was considered complete and accepted by the Army and the Air Force.

Senator COHEN. If that's all we're doing, isn't that kind of a useless gesture? Why fill out a form?

¹ See p. 335.

Mr. TUCKER. There's not much value in that review but then we would add that the scarcity of the information on the form makes it somewhat difficult to make an effective review.

Senator COHEN. So you would advocate much more specificity about the individuals job description and responsibilities while he or she was serving in the Federal Government?

Mr. TUCKER. Yes, sir. We recommended that to the General Counsel. He agreed with us.

Senator COHEN. What would you recommend for oversight to make sure that those forms, assuming they're filled out with greater specificity, are, in fact, being monitored beyond just looking to see that the blanks are filled in?

Mr. TUCKER. We've recommended mandated reviews by the General Counsel's Office and the ethics officials involved for the Army and the Air Force, because in the Army and the Air Force they were simply being reviewed by finance centers and personnel centers.

Senator COHEN. Mr. Cooke, I understand you don't have a written statement but would be prepared to answer any questions we might have?

Mr. COOKE. I'm here to answer any questions you may have, Mr. Chairman.

Senator COHEN. Thank you very much. As the OSD ethics official, have you engaged in counseling of employees who are about to leave DOD?

Mr. COOKE. DOD employees who leave the Office of the Secretary of Defense or Washington Headquarters Service are advised of the application of the conflict-of-interest requirement, reporting post-employment duties with defense contractors and other details.

Senator COHEN. How would possible violations of these post-employment conflict-of-interest laws come to your attention?

Mr. COOKE. I think Mr. Tucker made the telling point that the form itself, which I emphasized closely approximates the present requirements of the law, is simply not in sufficient detail to make an informed judgment.

As to the existence of conflicts, as you are well aware, section 207 does not forbid employment with Defense contractors but merely forbids certain representation at functions, in some cases for 2 years, in some cases for 1 year.

And absent the provision of more details—we are in the process I understand of revising the form to require more—and, incidentally, Senator Levin's proposals also provide for detail and a description of duties with the contractor and the relationship that the individual had with the contractor during his DOD employment or duty, would be essential to a realistic evaluation of conflict of interest.

Senator COHEN. You would support those kind of changes?

Mr. COOKE. Completely.

Senator COHEN. Senator Levin also has an amendment to the DOD authorization bill that any DOD employee who is discussing the possibility of a job with a contractor must recuse himself or herself from contract negotiations with that potential employer. If he or she doesn't, that employee is prohibited from taking a job with that contractor for a period of 2 years. Do you think that change is a helpful and instructive one?

Mr. COOKE. I do.

Senator COHEN. Do you think there are any additional laws or regulations that we should propose to guard against this?

Mr. COOKE. Well, I'm aware that the legislative proposals, Mr. Chairman, which in effect embargo for a period from 2 to 5 years an employee or former military officer from going to work for a defense contractor if he needed business.

As the previous witness has suggested, there's a difficult problem of balancing equities to begin with. I won't go into that because I think you've already covered it but it's also a very difficult drafting problem, because if you use the term "acquisition official" or "executive" there are all shades, from someone who is dealing every day with a contractor to someone whose participation interest may be merely peripheral or occasional.

No. 2, it's not a question of only one defense contractor. It's very simple to say, you're only dealing with only one defense contractor. You don't have to worry about the universe of other aerospace contractors, for example.

The problem is that a defense prime contractor has first second, and third tier subcontractors, and it would be very difficult with any official who deals with more than one defense contractor. That's why—speaking personally at this time, because the Department has not been asked to comment formally on Senator Levin's proposal—I strongly endorse the approach encompassed by your distinguished colleague.

Senator COHEN. Part of the problem is what happens every day. You're serving in DOD and along comes the defense contractor. Let's face it, they consider employing people who have developed expertise at public expense to go to work for them for several reasons. No. 1, they want the expertise. No. 2, they want the line that runs back into the Defense Department. We shouldn't kid about that. That's exactly what they have in mind.

Most people who serve in those functions know it's a stepping stone to a much higher paying job with the company and there are so many ways to forward that. They don't have to make an offer to go to you, Mr. Tucker or Mr. Cooke, Ms. Kleeman or anyone else and say, "Gee, you know, we think you're doing a heck of a job. Some day if you ever to go out of Government service, you ought to look around at the private sector." Is that a violation of the law; do they compromise your integrity? Have they made you a very subtle offer? There are all kinds of signals that they're sending from defense contractors and others.

Any contractor who does business with the Government tried to ingratiate himself with that particular individual and lets them know there's a place for him if and when he decides to retire from Government service. It goes on every single day.

I serve on the Armed Services Committee with Senator Levin. I can tell of generals and colonels who have retired from the services and formed consulting groups the next day, and who are then being hired as consultants by some of the biggest contractors. Why?

No. 1, they assume they've got expertise. No. 2, it's an old-boy network. All you've got to do is place a phone call. That's what we're trying to deal with.

Mr. COOKE. Mr. Chairman, I would suggest this is not limited only to the Department of Defense or, for that matter, to only the executive branch of the Government; beside the need for expertise is a two-way street.

We need people who are experienced in industry; we actively seek to recruit them for some of our senior positions. It would be, I think, damaging overall if—unless it were properly channeled—to lose the expertise both ways. But we need to do a good job.

Senator COHEN. I don't disagree with that, certainly.

Members of Congress are not immune from leaving public service and taking up jobs in the private sector at double, triple, or quadruple the financial rewards of public service. It's a well-known fact in this town as well. The real challenge is how do you balance that? How do you structure something that is reasonably fair so you can reassure people that the public interest is being served without having that individual making decisions which really benefit him and the individual contract? That's what we've got to do.

Is there any concern on your part about the Justice Department's interpretation of the lack of the need to file confidential disclosures?

Mr. COOKE. I can assure you that our requirement for filing our confidential disclosures is alive and well, and we are still requiring our employees below the level that have to file public disclosures to file the confidential disclosure form.

Senator COHEN. So what we've got is a great anomaly in our system where the chief law enforcement agency in the country has advocated the discontinuation of financial disclosure and other agencies who are subject to the law are trying to comply with it.

Mr. COOKE. Mr. Chairman, that opinion of legal counsel in Justice was rendered to Mr. Martin, and we have received no direction from Mr. Martin to cease the confidential disclosure that we are requiring under the Department of Defense directive in implementation of the Executive order.

Senator COHEN. It's every agency on its own, then.

Well, thank you very much. You've all been very helpful.

[Mr. Tucker's prepared statement follows:]

PREPARED STATEMENT OF ALVIN TUCKER

Mr. Chairman and members of the Committee, I am pleased to testify today on the work the Inspector General, Department of Defense has done on the ethics program in the Department of Defense. My statement will cover our audit Report No. 85-058, "Procedures and Controls for Filing Financial Disclosure Statements," December 24, 1984. I will also describe the work we did for Senator Percy on the implementation of post employment conflict of interest provisions of 18 U.S.C. 207 and related DoD regulations governing employment of former DoD personnel.

AUDIT REPORT

My organization, the Office of the Assistant Inspector General for Auditing, audited the procedures and controls for filing financial disclosure statements within the Department of Defense to determine whether DoD Agencies, Departments, and activities were complying with the financial disclosure provisions of the Ethics in Government Act, and with Departmental guidance on this same subject. Specifically, the audit focused on whether adequate Defense-wide guidance had been issued to ensure consistent implementation; whether procedures and controls had been established to ensure the timely and complete filing of financial disclosure statements; and whether management controls had been developed to preclude potential or apparent conflicts of interest.

The Ethics in Government Act of 1978 requires systematic reviews of the financial interests of current and prospective Government employees. The purpose of these reviews is to determine the ability of Government employees to perform their duties without compromising the public trust. Within the Department, the General Counsel, DoD, is the focal point for administering the Act. In this regard, the General Counsel had prepared and issued DoD Directive 5500.7, "Standards of Conduct," January 15, 1977, that incorporated policies, procedures and responsibilities within DoD for receiving and filing financial disclosure statements of DoD employees. In part, the directive states that the following personnel are required to submit an initial and annual "Confidential Statement of Affiliations and Financial Interests" (DD Form 155²) unless expressly exempted:

A. All civilian DoD personnel paid at a rate equal to or in excess of the minimum rate prescribed for employees holding the grade of GS-16, including the Executive Schedule.

B. Officers of flag or general rank.

C. Commanders and Deputy Commanders of major installations, activities, and operations, as determined by the heads of the DoD components.

D. Board members of the Armed Service Board of Contract Appeals.

E. DoD personnel classified at GS-13 or above, or at a comparable pay level under other authority, and members of the military in the rank of Lieutenant Colonel, Commander, or above, when the responsibilities of such personnel require the exercise of judgment in making a Government decision or in taking Government action in regard to activities in which the final decision or action may have a significant economic impact on the interests of any non-Federal entity.

F. Special Government employees.

G. Other DoD personnel who are required, with Civil Service Commission approval, to file such Statements.

The directive also assigns Standards of Conduct Counselors (ethics counselors) at DoD's Agencies, Departments and activities the responsibility for reviewing these financial disclosure statements. The requirements to file a disclosure statement must be incorporated into the employee's position description. In addition, all position descriptions must be reviewed at least annually to identify those positions that require statements. When a disclosure statement is required, both an initial and an annual statement must be submitted. The ethics counselor should

review initial disclosure statements prior to commencement of employee service.

During 1983, about 36,000 DoD civilians and military personnel filed financial disclosure statements. Our audit was made at 22 locations within the DoD and included a review of requirements for the statements of 1,256 personnel assigned to procurement and project management office positions in FY 1983. We also reviewed position descriptions of personnel who had not filed statements and who were also assigned to such functions. While we did not find any conflicts of interest, our audit disclosed weaknesses in internal controls over the above cited requirements.

We concluded that the administration and control of financial disclosure statements by DoD components did not always ensure that the required statements were completed, reviewed or monitored in accordance with financial disclosure regulations. In the main, these problems were related to disclosure statements filed on DD Form 1555 by employees in the grades GS-13 to GS-15. We found few problems with statements filed on Standard Form 278 by senior executives and appointed officials within the Department. We found that sufficient controls were not in effect to identify all personnel who should have been required to file annual financial disclosure statements. At 15 of the 22 locations we visited, we reviewed position descriptions of nonfiling personnel working in procurement and project management

offices. At 10 of the 15 locations, 89 employees did not file statements, yet their position descriptions specifically required the statements to be submitted. We also identified 86 position descriptions at 7 locations having duties and responsibilities, such as contract negotiation and source selection board membership, that we believe should have included financial disclosure filing requirements. These conditions occurred because neither supervisors nor ethics counselors were assuming the responsibility for reviewing position descriptions. Moreover, although a requirement of the Federal Personnel Manual, most of the activities had not developed adequate systems to identify employees required to file statements.

We also found inconsistencies in financial disclosure management within the Departments. For example, personnel in one Army program office who were not required to file had duties and responsibilities similar to incumbents in another Army program office who were required to file disclosure statements. In another instance, we found a Navy project officer who felt that only he should be required to file since he made all the final decisions in his office. On the other hand, we noted an instance in which an individual who could influence the decision making process did not file even though he supervised three subordinates who were required to submit disclosure statements.

Regarding the filing of initial financial disclosure statements, we found that nearly 71 percent of 230 newly appointed personnel reviewed had not submitted their initial disclosure statements for up to 11 months after commencing their service. Supervisors and ethics counselors were generally not ensuring that initial statements were obtained from incumbents upon their appointment to positions requiring financial disclosure.

Regarding disclosure statement reviews, ethics counselors did a good job reviewing those statements they received. However, ethics counselors at two Naval System Commands were not receiving all statements. Contrary to DoD and Navy guidance, such statements were not furnished to or reviewed by ethics counselors because local regulations at the respective commands allowed supervisors to retain the statements if no personal affiliations were listed. This prevented verification that financial disclosure statements had been filed.

At Headquarters, Defense Logistics Agency, 79 contract and procurement personnel were exempt from filing because in their supervisors' judgment they did not hold positions that would influence management decisions. While these exemptions may be appropriate, we believe that DoD "Exclusion of Positions" criteria should be revised to require documentation and approval in order to acknowledge that position descriptions have been

reviewed and that management decisions pertinent to the necessity to file statements have been made.

Finally, the Ethics in Government Act of 1978 requires all personnel GS-16 and above and their military equivalents to file a financial disclosure statement on Standard Form 278 regardless of the employee's duties and responsibilities. This requirement had not been incorporated into the DoD Directive. The Directive requires these employees to file financial disclosure statements on DD Form 1555. Disclosure statements on Standard Form 278 required by the Ethics in Government Act are more stringent than those required by the DoD directive. Although we found that the correct form was being filed by personnel GS-16 and above, the directive should be revised to reflect the provisions of the Act.

On the basis of these findings, we concluded that more comprehensive and definitive DoD financial disclosure guidance was needed to ensure that the disclosure programs of Defense components are consistently implemented and that all potential conflicts of interest are identified.

We recommend that the General Counsel, Department of Defense:

1. Revise DoD Directive 5500.7 to require DoD components to:

a. Designate an individual to be responsible for conducting initial and annual reviews of position descriptions.

b. Assign program oversight responsibilities to ethics counselors and require them to ensure that financial disclosure statements are complete and submitted within required timeframes.

c. Direct personnel officers, in conjunction with ethics counselors, to develop systems to identify all positions and incumbents required to file disclosure statements, to maintain listings of these positions and incumbents, and to monitor changes.

d. Improve filing criteria to make it clear that:

(1) Disclosure statements should not only be filed by those who make final decisions but also by those who participate in the decision making process.

(2) Disclosure statements should be filed by individuals who can influence the decision making process of supervised personnel required to submit statements.

e. Document and approve all determinations to eliminate certain positions from disclosure requirements based on "Exclusion of Positions" criteria.

f. Furnish all financial disclosure statements to their appropriate ethics counselor for review regardless of whether or not personal affiliations are listed.

g. Use the Standard Form 278 to process the financial disclosure statements of all personnel GS-16 and above and their military equivalents.

2. Direct the DoD components Standards of Conduct Counselors (ethics counselors) to review all official position descriptions and ensure that financial disclosure statements are on file for incumbents in positions that require disclosure statements.

The General Counsel, Department of Defense, concurred in our findings and recommendations and stated that efforts were under way to replace DoD Directive 5506.7 with a revision incorporating changes in the law and the recommendations made in the audit report.

Mr. Chairman, that is what we have done on financial disclosure statements filed by present employees. I would now like to discuss some work we did for Senator Percy on disclosure statements by former employees of the Department.

RESPONSE TO SENATOR PERCY

On June 11, 1984, then-Senator Percy asked the Inspector General of the Department of Defense, to review the Department's compliance with Department of Defense Directive 7700.15 entitled, "Reporting Procedures on Defense related Employment," and to answer 10 questions concerning the accuracy, completeness, and timeliness of the forms filed by former DoD employees to comply with the directive and the underlying statute. The General Accounting Office (GAO), was concurrently asked by Senator Percy to do an in-depth analysis of specific employees of one contractor. It is our understanding that the GAO request was subsequently broadened to include a number of contractors and is still in process.

Senator Percy was concerned about former military and civilian employees who go to work for DoD contractors, and he wanted to know whether or not DD Form 1787, "Report of DoD and Defense Related Employment," should be changed so that more

detailed information concerning the circumstances surrounding contractor employment would be disclosed to DoD.

In response to Senator Percy's request we reviewed DoD and Services procedures in processing DD Form 1787 and we reviewed how the information was used. We interviewed various DoD personnel in the Office of the Assistant Secretary of Defense (Manpower, Installations and Logistics), the Office of the General Counsel, and certain representatives in each of the Services and the Defense Logistics Agency. We also reviewed the legislative history, the DoD implementation directives in each Service, and sampled the actual reporting forms.

Our overall conclusion was that a more effective form should be prescribed, and that the DoD and Service reviews of individual submissions should be mandated to determine conflicts of interest. The current forms made it difficult to relate past DoD employment to a person's current position with a DoD contractor because, at times, the questions relating to DoD and contractor employment were answered in a nonspecific manner.

In a letter dated September 14, 1984, we responded to the Senator's 10 questions. In answer to his question concerning the design of the form to serve its statutory purpose, we said that the form followed the law quite closely. However, later in our reply we stated its value as a tool in reporting conflicts of

interests could have been enhanced by changing the form to make it more effective.

In response to his concerns about the extent present employees were aware of relevant postemployment restrictions, we found that the Services and the Defense Logistics Agency had set up procedures to inform all applicable employees of post employment restrictions and procedures. One Service, the Air Force, sends annual notifications to all military who retired within the past 3 years alerting them of the requirement to report their Defense related employment.

In answer to the Senator's questions as to whether the forms were filled out accurately, completely, and in a timely manner, we replied that some answers were either incomplete or insufficient to permit detection of possible conflicts of interest because of a lack of specifics as to the description of the work performed during and after Government Service. Those that were filed were generally filed within the required timeframes.

We found that in the past 3 fiscal years the following number of forms had been filed:

<u>Fiscal Year</u>	<u>Forms Filed</u>
1983	2,240
1982	2,637
1981	1,845

With reference to how DoD ensures those required to file, in fact, file, we found that there was no mechanism within DoD to monitor individual compliance. There was also no followup to determine if an individual did or did not file forms after the initial filing.

In response to his query as to who reviews the forms upon submission and what was the objective of the review, we found each Service differed in their review procedures. In the Navy and the Defense Logistics Agency, reviews were conducted by personnel offices and were coordinated with the General Counsel, who reviewed the forms to determine if the reportee was within the 3 years filing requirement and if all spaces on the form were filled out. These General Counsel offices also stated they checked the information submitted for potential violations. One case was referred by the Navy to the Chief of Naval Material for

possible conflict. Reviews by Army and Air Force, did not go beyond the applicability and completeness of the forms.

In response to a question about the extent of efforts made to verify the accuracy and completeness of the information, we stated there were no procedures in effect after the initial review.

We found no reported instances of failure to file the required form. In addition, there was a procedure to identify contractors who meet the \$10 million dollar negotiated contract threshold for employee filing, and these contractors were notified by DoD to remind their employees of the statutory requirement to file a post-DoD employment.

We concluded our report to Senator Percy with a recommendation to increase the dollar salary floor for employee filing from the current \$15,000 year level, and suggested a more effective form, and mandated reviews.

FUTURE WORK

With regard to financial disclosure statements filed by current employees of the Department, we plan to carefully review the revisions to DoD Directive 5500.7 agreed to by the General

Counsel office in response to our December 1984 report. I am told by the General Counsel's staff that the revised directive is almost ready to be circulated for comment within the Department of Defense.

The General Counsel also agreed, as a result of our work for Senator Percy, to assist in making some revisions to the DoD Directive 7700.15 governing the forms required for postemployment reporting by former officials. I am told the new directive will require more information about a person's specific duties during and after Government employment. It will also require mandated reviews of the accuracy of the data reported. Again, we will carefully review this revised directive when it is circulated for comment.

As for future audit work, we plan to defer to the General Accounting Office which is continuing its review of the accuracy of the specific information provided by former employees of the Department.

Mr. Chairman, that is the end of my prepared statement. I would be happy to answer any questions you or the members of your committee may have.

Senator COHEN. Before concluding the hearing this morning, I'd like to publicly thank Susan Collins and Mary Gerwin of the subcommittee staff. They've done a good job in working with all of you to accumulate this information and make it possible to even have an exploration of the issues involved. We're deeply grateful to them.

The committee will stand adjourned.

[Whereupon, at 12:20 p.m., the subcommittee was adjourned to reconvene at the call of the Chair.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

TITLE IV OF THE ETHICS IN GOVERNMENT ACT OF 1978, PUBLIC LAW 95-521, AS
AMENDED BY PUBLIC LAW 98-150

TITLE IV—OFFICE OF GOVERNMENT ETHICS

OFFICE OF GOVERNMENT ETHICS

SEC. 401. (a) There is established in the Office of Personnel Management an office to be known as the Office of Government Ethics.

(b) There shall be at the head of the Office of Government Ethics a Director (hereinafter referred to as the "Director"), who shall be appointed by the President, by and with the advice and consent of the Senate. Effective with respect to any individual appointed or reappointed by the President as Director on or after October 1, 1983, the term of service of the Director shall be five years.

AUTHORITY AND FUNCTIONS

SEC. 402. (a) The Director shall provide, in consultation with the Office of Personnel Management, overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency, as defined in section 105 of title 5, United States Code.

(b) The responsibilities of the Director shall include—

(1) developing, in consultation with the Attorney General and the Office of Personnel Management, rules and regulations to be promulgated by the President or the Director pertaining to conflicts of interest and ethics in the executive branch, including rules and regulations establishing procedures for the filing, review, and public availability of financial statements filed by officers and employees in the executive branch as required by title II of this Act;

(2) developing, in consultation with the Attorney General and the Office of Personnel Management, rules and regulations to be promulgated by the President or the Director pertaining to the identification and resolution of conflicts of interest;

(3) monitoring and investigating compliance with the public financial disclosure requirements of title II of this Act by officers

and employees of the executive branch and executive agency officials responsible for receiving, reviewing, and making available financial statements filed pursuant to such title;

(4) conducting a review of financial statements to determine whether such statements reveal possible violations of applicable conflict of interest laws or regulations and recommending appropriate action to correct any conflict of interest or ethical problems revealed by such review;

(5) monitoring and investigating individual and agency compliance with any additional financial reporting and internal review requirements established by law for the executive branch;

(6) interpreting rules and regulations issued by the President or the Director governing conflict of interest and ethical problems and the filing of financial statements;

(7) consulting, when requested, with agency ethics counselors and other responsible officials regarding the resolution of conflict of interest problems in individual cases;

(8) establishing a formal advisory opinion service whereby advisory opinions are rendered on matters of general applicability or on important matters of first impression after, to the extent practicable, providing interested parties with an opportunity to transmit written comments with respect to the request for such advisory opinion, and whereby such advisory opinions are compiled, published, and made available to agency ethics counselors and the public;

(9) ordering corrective action on the part of agencies and employees which the Director deems necessary;

(10) requiring such reports from executive agencies as the Director deems necessary;

(11) assisting the Attorney General in evaluating the effectiveness of the conflict of interest laws and in recommending appropriate amendments;

(12) evaluating, with the assistance of the Attorney General and the Office of Personnel Management, the need for changes in rules and regulations issued by the Director and the agencies regarding conflict of interest and ethical problems, with a view toward making such rules and regulations consistent with and an effective supplement to the conflict of interest laws;

(13) cooperating with the Attorney General in developing an effective system for reporting allegations of violations of the conflict of interest laws to the Attorney General, as required by section 535 of title 28, United States Code;

(14) providing information on and promoting understanding of ethical standards in executive agencies; and

(15) developing in consultation with the Office of Personnel Management and promulgating such rules and regulations as the Director determines necessary or desirable with respect to the evaluation of any item required to be reported by title II of this Act.

(c) In the development of policies, rules, regulations, procedures, and forms to be recommended, authorized, or prescribed by him, the Director shall consult when appropriate with the executive agencies affected and with the Attorney General.

(d)(1) Any rules or regulations issued under section 402 of the Ethics in Government Act of 1978 which are in effect immediately before the effective date of the amendments made by this Act shall remain in effect according to their terms until modified, superseded, set aside, or revoked on or after such effective date.

(2) The responsibilities of the Director of the Office of Government Ethics under paragraphs (6) and (12), respectively, of section 402(b) of the Ethics in Government Act of 1978, with respect to rules and regulations issued by the Office of Personnel Management before the effective date of the amendments made by this Act shall not be affected by this Act or any of the amendments made by this Act.

ADMINISTRATIVE PROVISIONS

SEC. 403. Upon the request of the Director, each executive agency is directed to—

(1) make its services, personnel, and facilities available to the Director to the greatest practicable extent for the performance of functions under this Act; and

(2) except when prohibited by law, furnish to the Director all information and records in its possession which the Director may determine to be necessary for the performance of his duties.

The authority of the Director under this section includes the authority to request assistance from the inspector general of an agency in conducting investigations pursuant to subsections (b)(3) and (b)(4) of section 402.

SEC. 404. In promulgating rules and regulations pertaining to financial disclosure, conflict of interest, and ethics in the executive branch, the Director shall issue rules and regulations in accordance with chapter 5 of title 5, United States Code. Any person may seek judicial review of any such rule or regulation.

AUTHORIZATION OF APPROPRIATIONS

SEC. 405. There are authorized to be appropriated to carry out the provisions of this title, and for no other purpose—

(1) not to exceed \$2,000,000 for the fiscal year ending September 30, 1979; and

(2) not to exceed \$2,000,000 for each of the nine fiscal years thereafter.

ANNUAL PAY

SEC. 406. Section 5316 of title 5, United States Code, is amended by adding at the end the following new paragraph:

“(146) Director of the Office of Government Ethics.”

SUBMISSION OF BUDGET

SEC. 407. (a) In the budget submitted to the Congress pursuant to section 1105(a) of title 31, United States Code, the President shall include estimated expenditures and proposed appropriations the President decides are necessary to support the Office of Government Ethics in the fiscal year for which the budget is submitted and the four fiscal years after that year.

(b) In the statement of changes submitted to Congress with respect to the budget pursuant to section 1106(b) of title 31, United States Code, the President shall specify the effect of such changes on the information submitted pursuant to subsection (a) of this section.

Executive Order 11222**PRESCRIBING STANDARDS OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES**

By virtue of the authority vested in me by Section 301 of Title 3 of the United States Code, and as President of the United States, it is hereby ordered as follows:

PART I—POLICY

SECTION 101. Where government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government. Each individual officer, employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.

PART II—STANDARDS OF CONDUCT

SECTION 201. (a) Except in accordance with regulations issued pursuant to subsection (b) of this section, no employee shall solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which—

(1) has, or is seeking to obtain, contractual or other business or financial relationships with his agency;

(2) conducts operations or activities which are regulated by his agency; or

(3) has interests which may be substantially affected by the performance or nonperformance of his official duty.

(b) Agency heads are authorized to issue regulations, coordinated and approved by the Civil Service Commission, implementing the provisions of subsection (a) of this section and to provide for such exceptions therein as may be necessary and appropriate in view of the nature of their agency's work and the duties and responsibilities of their employees. For example, it may be appropriate to provide exceptions (1) governing obvious family or personal relationships where the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors—the clearest illustration being the parents, children or spouses of federal employees; (2) permitting acceptance of food and refreshments available in the ordinary course of a luncheon or dinner or other meeting or on inspection tours where an employee may properly be in attendance; or (3) permitting acceptance of loans from banks or other financial institutions on customary terms to finance proper and usual activities of employees, such as home mortgage loans. This section shall be effective upon issuance of such regulations.

(c) It is the intent of this section that employees avoid any action, whether or not specifically prohibited by subsection (a), which might result in, or create the appearance of—

(1) using public office for private gain;

(2) giving preferential treatment to any organization or person;

(3) impeding government efficiency or economy;

- (4) losing complete independence or impartiality of action;
- (5) making a government decision outside official channels; or
- (6) affecting adversely the confidence of the public in the integrity of the Government.

SEC. 202. An employee shall not engage in any outside employment, including teaching, lecturing, or writing, which might result in a conflict, or an apparent conflict, between the private interests of the employee and his official government duties and responsibilities, although such teaching, lecturing, and writing by employees are generally to be encouraged so long as the laws, the provisions of this order, and Civil Service Commission and agency regulations covering conflict of interest and outside employment are observed.

SEC. 203. Employees may not (a) have direct or indirect financial interests that conflict substantially, or appear to conflict substantially, with their responsibilities and duties as Federal employees, or (b) engage in, directly or indirectly, financial transactions as a result of, or primarily relying upon, information obtained through their employment. Aside from these restrictions, employees are free to engage in lawful financial transactions to the same extent as private citizens. Agencies may, however, further restrict such transactions in the light of the special circumstances of their individual missions.

SEC. 204. An employee shall not use Federal property of any kind for other than officially approved activities. He must protect and conserve all Federal property, including equipment and supplies, entrusted or issued to him.

SEC. 205. An employee shall not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public.

SEC. 206. An employee is expected to meet all just financial obligations, especially those—such as Federal, State, or local taxes—which are imposed by law.

PART III—STANDARDS OF ETHICAL CONDUCT FOR SPECIAL GOVERNMENT EMPLOYEES

SECTION 301. This part applies to all "special Government employees" as defined in Section 202 of Title 18 of the United States Code, who are employed in the Executive Branch.

SEC. 302. A consultant, adviser or other special Government employee must refrain from any use of his public office which is motivated by, or gives the appearance of being motivated by, the desire for private gain for himself or other persons, including particularly those with whom he has family, business, or financial ties.

SEC. 303. A consultant, adviser, or other special Government employee shall not use any inside information obtained as a result of his government service for private personal gain, either by direct action on his part or by counsel, recommendations or suggestions to others, including particularly those with whom he has family, business, or financial ties.

SEC. 304. An adviser, consultant, or other special Government employee shall not use his position in any way to coerce, or give the appearance of coercing, another person to provide any financial benefit to him or persons with whom he has family, business, or financial ties.

SEC. 305. An adviser, consultant, or other special Government employee shall not receive or solicit from persons having business with his agency anything of value as a gift, gratuity, loan or favor for himself or persons with whom he has family, business, or financial ties while employed by the government or in connection with his work with the government.

SEC. 306. Each agency shall, at the time of employment of a consultant, adviser, or other special Government employee require him to supply it with a statement of all other employment. The statement shall list the names of all the corporations, companies, firms, State or local governmental organizations, research organizations and educational or other institutions in which he is serving as employee, officer, member, owner, director, trustee, adviser, or consultant. In addition, it shall list such other financial information as the appointing department or agency shall decide is relevant in the light of the duties the appointee is to perform. The appointee may, but need not, be required to reveal precise amounts of investments. The statement shall be kept current throughout the period during which the employee is on the Government rolls.

PART IV—REPORTING OF FINANCIAL INTERESTS

SECTION 401. (a) Not later than ninety days after the date of this order, the head of each agency, each Presidential appointee in the Executive Office of the President who is not subordinate to the head of an agency in that Office, and each full-time member of a committee, board, or commission appointed by the President, shall submit to the Chairman of the Civil Service Commission a statement containing the following:

(1) A list of the names of all corporations, companies, firms, or other business enterprises, partnerships, nonprofit organizations, and educational or other institutions—

(A) with which he is connected as an employee, officer, owner, director, trustee, partner, adviser, or consultant; or

(B) in which he has any continuing financial interests, through a pension or retirement plan, shared income, or otherwise, as a result of any current or prior employment or business or professional association; or

(C) in which he has any financial interest through the ownership of stocks, bonds, or other securities.

(2) A list of the names of his creditors, other than those to whom he may be indebted by reason of a mortgage on property which he occupies as a personal residence or to whom he may be indebted for current and ordinary household and living expenses.

(3) A list of his interests in real property or rights in lands, other than property which he occupies as a personal residence.

(b) Each person who enters upon duty after the date of this order in an office or position as to which a statement is required by this section shall submit such statement not later than thirty days after the date of his entrance on duty.

(c) Each statement required by this section shall be kept up to date by submission of amended statements of any changes in, or additions to, the information required to be included in the original statement, on a quarterly basis.

SEC. 402. The Civil Service Commission shall prescribe regulations, not inconsistent with this part, to require the submission of statements of financial interests by such employees, subordinate to the heads of agencies, as the Commission may designate. The Commission shall prescribe the form and content of such statements and the time or times and places for such submission.

SEC. 403. (a) The interest of a spouse, minor child, or other member of his immediate household shall be considered to be an interest of a person required to submit a statement by or pursuant to this part.

(b) In the event any information required to be included in a statement required by or pursuant to this part is not known to the person required to submit such statement but is known to other persons, the person concerned shall request such other persons to submit the required information on his behalf.

(c) This part shall not be construed to require the submission of any information relating to any person's connection with, or interest in, any professional society or any charitable, religious, social, fraternal, educational, recreational, public service, civic, or political organization or any similar organization not conducted as a business enterprise and which is not engaged in the ownership or conduct of a business enterprise.

SEC. 404. The Chairman of the Civil Service Commission shall report to the President any information contained in statements required by Section 401 of this part which may indicate a conflict between the financial interests of the official concerned and the performance of his services for the Government. The Commission shall report, or by regulation require reporting, to the head of the agency concerned any information contained in statements submitted pursuant to regulations issued under Section 402 of this part which may indicate a conflict between the financial interests of the officer or employee concerned and the performance of his services for the Government.

SEC. 405. The statements and amended statements required by or pursuant to this part shall be held in confidence, and no information as to the contents thereof shall be disclosed except as the Chairman of the Civil Service Commission or the head of the agency concerned may determine for good cause shown.

SEC. 406. The statements and amended statements required by or pursuant to this part shall be in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, regulation, or order. The submission of a statement or amended statements required by or pursuant to this part shall not be deemed

to permit any person to participate in any matter in which his participation is prohibited by law, regulation, or order.

PART V—DELEGATING AUTHORITY OF THE PRESIDENT UNDER SECTIONS 205 AND 208 OF TITLE 18 OF THE UNITED STATES CODE RELATING TO CONFLICTS OF INTEREST

SECTION 501. As used in this part, "department" means an executive department, "agency" means an independent agency or establishment or a Government corporation, and "head of an agency" means, in the case of an agency headed by more than one person, the chairman or comparable member of such agency.

SEC. 502. There is delegated, in accordance with and to the extent prescribed in Sections 503 and 504 of this part, the authority of the President under Sections 205 and 208(b) of Title 18, United States Code, to permit certain actions by an officer or employee of the Government, including a special Government employee, for appointment to whose position the President is responsible.

SEC. 503. Insofar as the authority of the President referred to in Section 502 extends to any appointee of the President subordinate to or subject to the chairmanship of the head of a department or agency, it is delegated to such department or agency head.

SEC. 504. Insofar as the authority of the President referred to in Section 502 extends to an appointee of the President who is within or attached to a department or agency for purposes of administration, it is delegated to the head of such department or agency.

SEC. 505. Notwithstanding any provision of the preceding sections of this part to the contrary, this part does not include a delegation of the authority of the President referred to in Section 502 insofar as it extends to:

- (a) The head of any department or agency in the Executive Branch;
- (b) Presidential appointees in the Executive Office of the President who are not subordinate to the head of an agency in that Office; and
- (c) Presidential appointees to committees, boards, commissions, or similar groups established by the President.

PART VI—PROVIDING FOR THE PERFORMANCE BY THE CIVIL SERVICE COMMISSION OF CERTAIN AUTHORITY VESTED IN THE PRESIDENT BY SECTION 1753 OF THE REVISED STATUTES

SECTION 601. The Civil Service Commission is designated and empowered to perform, without the approval, ratification, or other action of the President, so much of the authority vested in the President by Section 1753 of the Revised Statutes of the United States (5 U.S.C. 631) as relates to establishing regulations for the conduct of persons in the civil service.

SEC. 602. Regulations issued under the authority of Section 601 shall be consistent with the standards of ethical conduct provided elsewhere in this order.

PART VII—GENERAL PROVISIONS

SECTION 701. The Civil Service Commission is authorized and directed, in addition to responsibilities assigned elsewhere in this order:

(a) To issue appropriate regulations and instructions implementing Parts II, III, and IV of this order;

(b) To review agency regulations from time to time for conformance with this order; and

(c) To recommend to the President from time to time such revisions in this order as may appear necessary to ensure the maintenance of high ethical standards within the Executive Branch.

SEC. 702. Each agency head is hereby directed to supplement the standards provided by law, by this order, and by regulations of the Civil Service Commission with regulations of special applicability to the particular functions and activities of his agency. Each agency head is also directed to assure (1) the widest possible distribution of regulations issued pursuant to this section, and (2) the availability of counseling for those employees who request advice or interpretation.

SEC. 703. The following are hereby revoked:

(a) Executive Order No. 10939 of May 5, 1961.

(b) Executive Order No. 11125 of October 29, 1963.

(c) Section 2(a) of Executive Order No. 10530 of May 10, 1954.

(d) White House memorandum of July 20, 1961, on "Standards of Conduct for Civilian Employees."

(e) The President's Memorandum of May 2, 1963, "Preventing Conflicts of Interest on the Part of Special Government Employees." The effective date of this revocation shall be the date of issuance by the Civil Service Commission of regulations under Section 701(a) of this order.

SEC. 704. All actions heretofore taken by the President or by his delegates in respect of the matters affected by this order and in force at the time of the issuance of this order, including any regulations prescribed or approved by the President or by his delegates in respect of such matters, shall, except as they may be inconsistent with the provisions of this order or terminate by operation of law, remain in effect until amended, modified, or revoked pursuant to the authority conferred by this order.

SEC. 705. As used in this order, and except as otherwise specifically provided herein, the term "agency" means any executive department, or any independent agency or any Government corporation; and the term "employee" means any officer or employee of an agency.

LYNDON B. JOHNSON

THE WHITE HOUSE,
May 8, 1965.

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PART 735—EMPLOYEE RESPONSIBILITIES AND CONDUCT

NOTE: Part 1001 added to this chapter, 31 FR 873, January 22, 1966 and revised 32 FR 11113, Aug. 1, 1967 and 36 FR 6874, Apr. 9, 1971, supplements this Part 735.

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- 735.412 Specific provisions of agency regulations for special Government employees.

AUTHORITY: Secs. 602, 701, 702; E.O. 11222, 3 CFR, 1964-1965 Comp., p. 306, unless otherwise noted, 18 U.S.C. 201 note.

SOURCE: 33 FR 12487, Sept. 4, 1968, unless otherwise noted.

Subpart A—General Provisions

§ 735.101 Purpose.

The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by Government employees and special Government employees is essential to assure the proper performance of the Govern-

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ment business and the maintenance of confidence by citizens in their Government. The avoidance of misconduct and conflicts of interest on the part of Government employees and special Government employees through informed judgment is indispensable to the maintenance of these standards. To accord with these concepts, this part sets forth OPM regulations under which each agency head shall issue regulations covering the agency's employees and special Government employees, prescribing standards of conduct and responsibilities, and governing statements reporting employment and financial interests.

§ 735.102 Definitions.

In this part:

(a) "Agency" means an Executive agency (other than the General Accounting Office) as defined by section 105 of title 5, United States Code, the Postal Service, and the Postal Rate Commission.

(b) "Employee" means an employee of an agency, but does not include a special Government employee or a member of the uniformed services.

(c) "Executive order" means Executive Order 11222 of May 8, 1965.

(d) "Person" means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, or any other organization or institution.

(e) "Special Government employee" means a "special Government employee" as defined in section 202 of title 18, United States Code, who is employed in the executive branch, but does not include a member of the uniformed services.

(f) "Uniformed services" has the meaning given that term by section 2101 of title 5, United States Code.

[33 FR 12487, Sept. 4, 1968, as amended at 36 FR 11999, June 24, 1971]

§ 735.103 Applicability to members of the uniformed services.

This part, except this section, is not applicable to members of the uniformed services. Each agency having jurisdiction over members of the uniformed services shall issue regulations covering those members and regulating their ethical and other conduct

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and the reporting of employment and financial interests in a manner consistent with the Executive order and this part.

§ 735.104 Issuance, approval, and publication of agency regulations.

(a) Except as provided in paragraph (f) of this section, each agency head shall prepare, and submit to OPM for approval, regulations in accordance with this part that:

(1) Implement the requirements of law, the Executive order, and this part; and

(2) Prescribe additional standards of ethical and other conduct and reporting requirements that are appropriate to the particular functions and activities of the agency and are not inconsistent with law, the Executive order, and this part.

(b) After OPM approval each agency head shall:

(1) Submit the agency's regulations to the **FEDERAL REGISTER** for publication;

(2) Furnish each employee and special Government employee a copy of the appropriate agency regulations (or a comprehensive summary thereof) within 90 days after approval;

(3) Furnish each new employee and special Government employee a copy of the appropriate agency regulations (or a comprehensive summary thereof) at the time of his entrance on duty;

(4) Bring the appropriate agency regulations to the attention of each employee and special Government employee annually, and at such other times as circumstances warrant;

(5) Assure the availability of counseling to each employee and special Government employee as provided in § 735.105; and

(6) Have available for review by employees and special Government employees, as appropriate, copies of laws, the Executive order, agency regulations, and pertinent OPM regulations and instructions relating to ethical and other conduct.

(c) Agency regulations issued under this part are effective only after approval by OPM and publication in the **FEDERAL REGISTER**.

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(d) Requests for approval of agency regulations to be issued under this part shall be directed to the Office of Personnel Management, Office of the General Counsel, Washington, D.C. 20415.

(e) This section applies to any amendment of agency regulations issued under this part.

(f) An agency head who does not consider it feasible to prepare agency regulations under this part because of the small number of his employees, or for another reason acceptable to OPM, may adopt the regulations in this part for application, as appropriate, to the employees and special Government employees of his agency if:

(1) He obtains the approval of OPM for that adoption; and

(2) After obtaining that approval, he submits a notice to the FEDERAL REGISTER announcing the applicability of this part to his employees.

§ 735.105 Interpretation and advisory service.

(a) Each agency head shall designate a top-ranking employee of his agency who has appropriate experience, preferably legal, and in whom he has complete personal confidence, to be the counselor for the agency and to serve as the agency's designee to OPM on matters covered by this part. The counselor shall be made responsible for coordination of the agency's counseling services provided under paragraph (b) of this section and for assuring that counseling and interpretations on questions of conflicts of interest and other matters covered by this part are available to deputy counselors designated under paragraph (b) of this section.

(b) Each agency head shall designate deputy counselors for the agency's employees and special Government employees. Deputy counselors designated under this section shall be qualified and in a position to give authoritative advice and guidance to each employee and special Government employee who seeks advice and guidance on questions of conflicts of interest and on other matters covered by this part.

(c) Each agency shall notify its employees and special Government employees of the availability of counsel-

ing services and of how and where these services are available. This notification shall be made within 90 days after approval of the agency regulations to be issued under this part, and periodically thereafter. In the case of a new employee or special Government employee appointed after this notification, notification shall be made at the time of his entrance on duty.

§ 735.106 Reviewing statements and reporting conflicts of interest.

(a) Agency regulations issued under this part shall establish a system for the review of statements of employment and financial interests submitted under Subpart D of this part. The system of review shall be designed to disclose conflicts of interest or apparent conflicts of interest on the part of employees and special Government employees.

(b) The system of review established under paragraph (a) of this section shall provide that, when a statement submitted under Subpart D of this part or information from other sources indicates a conflict between the interests of an employee or special Government employee and the performance of his services for the Government and when the conflict or appearance of conflict is not resolved at a lower level in the agency, the information concerning the conflict or appearance of conflict shall be reported to the agency head through the counselor for the agency.

(c) The employee or special Government employee concerned shall be provided an opportunity to explain the conflict or appearance of conflict.

§ 735.107 Disciplinary and other remedial action.

(a) Agency regulations issued under this part shall provide that a violation of the agency regulations by an employee or special Government employee may be cause for appropriate disciplinary action which may be in addition to any penalty prescribed by law.

(b) When, after consideration of the explanation of the employee or special Government employee provided by § 735.106, the agency head decides that remedial action is required, he shall

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take immediate action to end the conflicts or appearance of conflicts of interest. Remedial action may include, but is not limited to:

- (1) Changes in assigned duties;
- (2) Divestment by the employee or special Government employee of his conflicting interest;
- (3) Disciplinary action; or
- (4) Disqualification for a particular assignment.

Remedial action, whether disciplinary or otherwise, shall be effected in accordance with any applicable laws, Executive orders, and regulations.

Subpart B—Agency Regulations Governing Ethical and Other Conduct and Responsibilities of Employees

§ 735.201 Specific provisions of agency regulations.

Agency regulations issued under this subpart, as a minimum, shall contain provisions covering the standards of and governing the ethical and other conduct of its employees set forth in §§ 735.202 through 735.210.

§ 735.201a Proscribed actions.

An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:

- (a) Using public office for private gain;
- (b) Giving preferential treatment to any person;
- (c) Impeding Government efficiency or economy;
- (d) Losing complete independence or impartiality;
- (e) Making a Government decision outside official channels; or
- (f) Affecting adversely the confidence of the public in the integrity of the Government.

§ 735.202 Gifts, entertainment, and favors.

(a) Except as provided in paragraphs (b) and (f) of this section, an employee shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from a person who:

- (1) Has, or is seeking to obtain, contractual or other business or financial relations with his agency;

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(2) Conducts operations or activities that are regulated by his agency; or

(3) Has interests that may be substantially affected by the performance or nonperformance of his official duty.

(b) Agency regulations implementing paragraph (a) of this section may provide for such exceptions as may be necessary and appropriate in view of the nature of the agency's work and the duties and responsibilities of the employees. Appropriate exceptions which may be made by an agency include, but are not limited to, those that:

(1) Govern obvious family or personal relationships (such as those between the parents, children, or spouse of the employee and the employee) when the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors;

(2) Permit acceptance of food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting or on an inspection tour where an employee may properly be in attendance;

(3) Permit acceptance of loans from banks or other financial institutions on customary terms of finance proper and usual activities of employees, such as home mortgage loans; and

(4) Permit acceptance of unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars and other items of nominal intrinsic value.

(c) [Reserved]

(d) An employee shall not solicit a contribution from another employee for a gift to an official superior, make a donation as a gift to an official superior, or accept a gift from an employee receiving less pay than himself (5 U.S.C. 7351). However, this paragraph does not prohibit a voluntary gift of nominal value or donation in a nominal amount made on a special occasion such as marriage, illness, or retirement.

(e) An employee shall not accept a gift, present, decoration, or other thing from a foreign government unless authorized by Congress as provided by the Constitution and in sec-

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tion 7342 of title 5, United States Code.

(f) Neither this section nor § 735.203 precludes an employee from receipt of bona fide reimbursement, unless prohibited by law, for expenses of travel and such other necessary subsistence as is compatible with this part for which no Government payment or reimbursement is made. However, this paragraph does not allow an employee to be reimbursed, or payment to be made on his behalf, for excessive personal living expenses, gifts, entertainment, or other personal benefits, nor does it allow an employee to be reimbursed by a person for travel on official business under agency orders when reimbursement is proscribed by Decision B-128527 of the Comptroller General dated March 7, 1967 (46 Comp. Gen. 689).

§ 735.203 Outside employment and other activity.

(a) An employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of his Government employment. Incompatible activities include but are not limited to:

(1) Acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, conflicts of interest; or

(2) Outside employment which tends to impair his mental or physical capacity to perform his Government duties and responsibilities in an acceptable manner.

(b) An employee shall not receive any salary or anything of monetary value from a private source as compensation for his services to the Government (18 U.S.C. 209).

(c) Employees are encouraged to engage in teaching, lecturing, and writing that is not prohibited by law, the Executive order, this part, or the agency regulations. However, an employee shall not, either for or without compensation, engage in teaching, lecturing, or writing, including teaching, lecturing, or writing for the purpose of the special preparation of a person or class of persons for an examination of

OPM or Board of Examiners for the Foreign Service, that depends on information obtained as a result of his Government employment, except when that information has been made available to the general public or will be made available on request, or when the agency head gives written authorization for use of nonpublic information on the basis that the use is in the public interest. In addition, an employee who is a Presidential appointee covered by section 401(a) of the order shall not receive compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs, or operations of his agency, or which draws substantially on official data or ideas which have not become part of the body of public information.

(d) [Reserved]

(e) This section does not preclude an employee from:

(1) [Reserved]

(2) Participation in the activities of national or State political parties not proscribed by law.

(3) Participation in the affairs of or acceptance of an award for a meritorious public contribution or achievement given by a charitable, religious, professional, social, fraternal, nonprofit educational and recreational, public service, or civic organization.

(4) Outside employment permitted under the regulations of his agency issued under this part.

§ 735.204 Financial interests.

(a) An employee shall not:

(1) Have a direct or indirect financial interest that conflicts substantially, or appears to conflict substantially, with his Government duties and responsibilities; or

(2) Engage in, directly or indirectly, a financial transaction as a result of, or primarily relying on, information obtained through his Government employment.

(b) This section does not preclude an employee from having a financial interest or engaging in financial transactions to the same extent as a private citizen not employed by the Govern-

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ment so long as it is not prohibited by law, the Executive order, this section, or the agency regulations.

§ 735.205 Use of Government property.

An employee shall not directly or indirectly use, or allow the use of, Government property of any kind, including property leased to the Government, for other than officially approved activities. An employee has a positive duty to protect and conserve Government property, including equipment, supplies, and other property entrusted or issued to him.

§ 735.206 Misuse of information.

For the purpose of furthering a private interest, an employee shall not, except as provided in § 735.203(c), directly or indirectly use, or allow the use of, official information obtained through or in connection with his Government employment which has not been made available to the general public.

§ 735.207 Indebtedness.

An employee shall pay each just financial obligation in a proper and timely manner, especially one imposed by law such as Federal, State or local taxes. For the purpose of this section, a "just financial obligation" means one acknowledged by the employee or reduced to judgment by a court or one imposed by law such as Federal, State or local taxes, and "in a proper and timely manner" means in a manner which the agency determines does not, under the circumstances, reflect adversely on the Government as his employer. In the event of dispute between an employee and an alleged creditor, this section does not require an agency to determine the validity or amount of the disputed debt.

[40 FR 7435, Feb. 20, 1975]

§ 735.208 Gambling, betting, and lotteries.

An employee shall not participate while on Government-owned or leased property or while on duty for the Government, in any gambling activity including the operation of a gambling device, in conducting a lottery or pool, in a game for money or property, or in selling or purchasing a numbers slip or

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ticket. However, this section does not preclude activities:

- (a) Necessitated by an employee's law enforcement duties; or
- (b) Under section 3 of Executive Order 10927 and similar agency-approved activities.

§ 735.209 General conduct prejudicial to the Government.

An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

§ 735.210 Miscellaneous statutory provisions.

Each employee shall acquaint himself with each statute that relates to his ethical and other conduct as an employee of his agency and of the Government. An agency shall direct the attention of its employees, by specific reference in the agency regulations issued under this part, to each statute relating to the ethical and other conduct of employees of that agency and to the following statutory provisions:

- (a) House Concurrent Resolution 175, 85th Congress, 2d session, 72A Stat. B12, the "Code of Ethics for Government Service".
- (b) Chapter 11 of title 18, United States Code, relating to bribery, graft, and conflicts of interest, as appropriate to the employees concerned.
- (c) The prohibition against lobbying with appropriated funds (18 U.S.C. 1913).
- (d) The prohibitions against disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918).
- (e) The prohibition against the employment of a member of a Communist organization (50 U.S.C. 784).
- (f) The prohibitions against (1) the disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 783); and (2) the disclosure of confidential information (18 U.S.C. 1905).
- (g) The provision relating to the habitual use of intoxicants to excess (5 U.S.C. 7352).
- (h) The prohibition against the misuse of a Government vehicle (31 U.S.C. 638a(c)).

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§ 735.305

(l) The prohibition against the misuse of the franking privilege (18 U.S.C. 1719).

(j) The prohibition against the use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

(k) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(l) The prohibition against mutilating or destroying a public record (18 U.S.C. 2071).

(m) The prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508).

(n) The prohibitions against (1) embezzlement of Government money or property (18 U.S.C. 641); (2) failing to account for public money (18 U.S.C. 643); and (3) embezzlement of the money or property of another person in the possession of an employee by reason of his employment (18 U.S.C. 654).

(o) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(p) The prohibitions against political activities in subchapter III of chapter 73 of title 5, United States Code and 18 U.S.C. 602, 603, 607, and 608.

(q) The prohibition against an employee acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

Subpart C—Agency Regulations Governing Ethical and Other Conduct and Responsibilities of Special Government Employees

§ 735.301 Specific provisions of agency regulations.

Agency regulations issued under this subpart, as a minimum, shall contain provisions covering the standards of and governing the ethical and other conduct of its special Government employees as set forth in §§ 735.302 through 735.306. In addition, to the extent considered appropriate by the agency head, the agency regulations issued under this subpart shall require its special Government employees to adhere to the standards of conduct made applicable to employees by the

agency regulations issued under Subpart B of this part.

§ 735.302 Use of Government employment.

A special Government employee shall not use his Government employment for a purpose that is, or gives the appearance of being, motivated by the desire for private gain for himself or another person, particularly one with whom he has family, business, or financial ties.

§ 735.303 Use of inside information.

(a) A special Government employee shall not use inside information obtained as a result of his Government employment for private gain for himself or another person either by direct action on his part or by counsel, recommendation, or suggestion to another person, particularly one with whom he has family, business, or financial ties. For the purpose of this section, "inside information" means information obtained under Government authority which has not become part of the body of public information.

(b) Agency regulations implementing paragraph (a) of this section may provide that special Government employees may teach, lecture, or write in a manner not inconsistent with § 735.203(c) in regard to employees.

§ 735.304 Coercion.

A special Government employee shall not use his Government employment to coerce, or give the appearance of coercing, a person to provide financial benefit to himself or another person, particularly one with whom he has family, business, or financial ties.

§ 735.305 Gifts, entertainment, and favors.

(a) Except as provided in paragraph (b) of this section, a special Government employee, while so employed or in connection with his employment, shall not receive or solicit from a person having business with his agency anything of value as a gift, gratuity, loan, entertainment, or favor for himself or another person, particularly one with whom he has family, business, or financial ties.

(b) Agency regulations implementing paragraph (a) of this section may pro-

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vide for exceptions for special Government employees that are not inconsistent with the exceptions authorized for their employees under § 735.202(b).

§ 735.306 Miscellaneous statutory provisions.

Each special Government employee shall acquaint himself with each statute that relates to his ethical and other conduct as a special Government employee of his agency and of the Government. An agency shall direct the attention of its special Government employees, by specific reference in the agency regulations issued under this part, to each statute relating to the ethical and other conduct of special Government employees of that agency and to those statutory provisions listed in § 735.210 that are applicable to special Government employees.

Subpart D—Agency Regulations Governing Statements of Employment and Financial Interests**§ 735.401 Form and content of statements.**

The statements of employment and financial interests required under this subpart for use by employees and special Government employees shall contain, as a minimum, the information required by the formats prescribed by OPM in the Federal Personnel Manual. An agency shall not include questions on a statement of employment and financial interests that go beyond, or are in greater detail than, those included on OPM's formats without the approval of OPM.

§ 735.402 Specific provisions of agency regulations for employees.

Agency regulations issued under this subpart for employees, as a minimum, shall contain provisions covering the reporting requirements set forth in §§ 735.403 through 735.411.

§ 735.403 Employees required to submit statements.

Except as provided in § 735.404, each agency head shall require statements of employment and financial interests from:

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(a) Employees paid at a level of the Executive Schedule in subchapter II of chapter 53 of title 5, United States Code.

(b) Employees classified at GS-13 or above under section 5332 of title 5, United States Code, or at a comparable pay level under another authority, who are in positions identified in the agency's regulations as positions the incumbents of which are responsible for making a Government decision or taking a Government action in regard to:

- (1) Contracting or procurement;
- (2) Administering or monitoring grants or subsidies;
- (3) Regulating or auditing private or other non-Federal enterprise; or
- (4) Other activities where the decision or action has an economic impact on the interests of any non-Federal enterprise.

(c) Employees classified at GS-13 or above under section 5332 of title 5, United States Code, or at a comparable pay level under another authority, who are in positions which the agency has determined have duties and responsibilities which require the incumbent to report employment and financial interests in order to avoid involvement in a possible conflicts-of-interest situation and carry out the purpose of law, Executive order, this part, and the agency's regulations.

(d) Employees classified below GS-13 under section 5332 of title 5, United States Code, or at a comparable pay level under another authority, who are in positions which otherwise meet the criteria in paragraph (b) or (c) of this section, when the inclusion of the positions in the agency's regulations has been specifically justified by the agency in writing to OPM as an exception that is essential to protect the integrity of the Government and avoid employee involvement in a possible conflicts-of-interest situation.

§ 735.403a Employee's complaint on filing requirement.

Agency regulations issued under this subpart shall inform employees of the opportunity for review through the agency's grievance procedure of a complaint by an employee that his posi-

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tion has been improperly included under the regulations of his agency as one requiring the submission of a statement of employment and financial interests.

§ 735.404 Employees not required to submit statements.

(a) Employees in positions that meet the criteria in paragraph (b) of § 735.403 may be excluded from the reporting requirement when the agency determines that:

(1) The duties of a position are such that the likelihood of the incumbent's involvement in a conflicts-of-interest situation is remote;

(2) The duties of a position are at such a level of responsibility that the submission of a statement of employment and financial interests is not necessary because of the degree of supervision and review over the incumbent or the inconsequential effect on the integrity of the Government; or

(3) The use of an existing or alternative procedure approved by OPM is adequate to prevent possible conflicts of interest.

(b) A statement of employment and financial interests is not required by this subpart from an agency head, a Presidential appointee in the Executive Office of the President who is not subordinate to the head of an agency in that office, or a full-time member of a committee, board, or commission appointed by the President. These employees are subject to separate reporting requirements under section 401 of the Executive order.

§ 735.404a Interests not required to be reported.

Agency regulations issued under this subpart may exclude the reporting of any interest which has, by general rule or regulation published in the **FEDERAL REGISTER** under section 208(b)(2) of title 18, United States Code, been exempted as too remote or too inconsequential to affect the integrity of employees' services.

§ 735.405 Time and place for submission of employees' statements.

An employee required to submit a statement of employment and financial interests under the regulations of

his agency shall submit that statement to the office designated in the agency regulations not later than:

(a) Ninety days after the effective date of the agency regulations issued under this part if employed on or before that effective date; or

(b) Thirty days after his entrance on duty, but not earlier than ninety days after the effective date, if appointed after that effective date.

§ 735.406 Supplementary statements.

Changes in, or additions to, the information contained in an employee's statement of employment and financial interests shall be reported in a supplementary statement as of June 30 each year, except when OPM authorizes a different date on a showing by an agency of necessity therefor. If no changes or additions occur, a negative report is required. Notwithstanding the filing of the annual report required by this section, each employee shall at all times avoid acquiring a financial interest that could result, or taking an action that would result, in a violation of the conflicts-of-interest provisions of section 208 of title 18, United States Code, or Subpart B of this part.

§ 735.407 Interests of employees' relatives.

The interest of a spouse, minor child, or other member of an employee's immediate household is considered to be an interest of the employee. For the purpose of this section, "member of an employee's immediate household" means those blood relations who are residents of the employee's household.

§ 735.408 Information not known by employees.

If any information required to be included on a statement of employment and financial interests or supplementary statement, including holdings placed in trust, is not known to the employee but is known to another person, the employee shall request that other person to submit information in his behalf.

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§ 735.409 Information not required.

This subpart does not require an employee to submit on a statement of employment and financial interests or supplementary statement any information relating to the employee's connection with, or interest in, a professional society or a charitable, religious, social, fraternal, recreational, public service, civic, or political organization or a similar organization not conducted as a business enterprise. For the purpose of this section, educational and other institutions doing research and development or related work involving grants of money from or contracts with the Government are deemed "business enterprises" and are required to be included in an employee's statement of employment and financial interests.

[33 FR 12487, Sept. 4, 1968, as amended at 40 FR 48339, Oct. 15, 1975]

§ 735.410 Confidentiality of employees' statements.

An agency shall hold each statement of employment and financial interests, and each supplementary statement, in confidence. To insure this confidentiality, an agency shall designate which employees are authorized to review and retain the statements. Employees so designated are responsible for maintaining the statements in confidence and shall not allow access to, or allow information to be disclosed from, a statement except to carry out the purpose of this part. An agency may not disclose information from a statement except as OPM or the agency head may determine for good cause shown.

§ 735.411 Effect of employees' statements on other requirements.

The statements of employment and financial interests and supplementary statements required of employees are in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, order, or regulation. The submission of a statement or supplementary statement by an employee does not permit him or any other person to participate in a matter in which his or the other per-

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son's participation is prohibited by law, order, or regulation.

§ 735.412 Specific provisions of agency regulations for special Government employees.

(a) Agency regulations issued under this subpart for special Government employees, as a minimum, shall contain provisions covering the reporting requirements set forth in this section.

(b) Except as provided in paragraph (c) of this section, each agency head shall require each special Government employee to submit a statement of employment and financial interests which reports:

- (1) All other employment; and
- (2) The financial interests of the special Government employee which the agency determines are relevant in the light of the duties he is to perform.

(c) An agency head may waive the requirement in paragraph (b) of this section for the submission of a statement of employment and financial interests in the case of a special Government employee who is not a consultant or an expert when the agency finds that the duties of the position held by that special Government employee are of a nature and at such a level of responsibility that the submission of the statement by the incumbent is not necessary to protect the integrity of the Government. For the purpose of this paragraph, "consultant" and "expert" have the meanings given those terms by Chapter 304 of the Federal Personnel Manual, but do not include:

- (1) A physician, dentist, or allied medical specialist whose services are procured to provide care and service to patients; or
- (2) A veterinarian whose services are procured to provide care and service to animals.
- (3) A specialist appointed for intermittent confidential intelligence consultation of brief duration.

(d) A statement of employment and financial interest required to be submitted under this section shall be submitted not later than the time of employment of the special Government employee as provided in the agency-

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regulations. Each special Government employee shall keep his statement current throughout his employment with the agency by the submission of supplementary statements.

[33 FR 12487, Sept. 4, 1968, as amended at 34 FR 6515, Apr. 16, 1969]

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United States Senate

COMMITTEE ON
 GOVERNMENTAL AFFAIRS
 SUBCOMMITTEE ON
 OVERSIGHT OF GOVERNMENT MANAGEMENT
 WASHINGTON, D.C. 20510

SUBCOMMITTEE
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March 14, 1985

David R. Scott, Esquire
 Office of University Counsel
 Rutgers -- The State University
 Geology Hall, Room 105
 New Brunswick, New Jersey 08903

Dear Mr. Scott:

The Senate Subcommittee on Oversight of Government Management will hold a hearing on oversight of the Office of Government Ethics on Tuesday, April 2. The primary focus of the hearing will be the OGE's implementation of its duties under Title IV of the Ethics in Government Act of 1978. The hearing will also examine implementation of post-employment conflict-of-interest provisions of the Ethics Act and the confidential disclosure system throughout the Executive Branch.

It would be most beneficial for the Subcommittee to have the benefit of your views on some of these issues in light of your extensive experience with the Ethics in Government Act and Executive Branch ethics program in your former capacity as General Counsel and Acting Director of the Office of Government Ethics. While I understand that you are unable to testify in person before the Subcommittee, I would greatly appreciate your providing the Subcommittee with responses to the following questions:

- (1) Please describe the positions you held, with accompanying dates, at the Office of Government Ethics.
- (2) Please respond to the following questions concerning Executive Order 11222 and regulations governing standards of conduct for Executive Branch personnel.

David R. Scott, Esquire
March 14, 1985
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- (a) Is conduct by an Executive Branch employee which creates the appearance of a conflict of interest a violation of Executive Order 11222 or standards-of-conduct regulations?
 - (b) The current OGE director, David Martin, has described Section 201(c) of the Executive Order as "aspirational" in nature. Do you agree with this interpretation?
 - (c) During your tenure at the OGE, what was the position of the OGE concerning the appearance of conflicts of interest?
 - (d) During your tenure as Acting Director or General Counsel of the OGE, how did OGE advise designated agency ethics officials to interpret the Executive Order in situations involving the appearance of conflicts of interest? Did the OGE training programs address this issue?
 - (e) What procedures did the OGE follow in instances where an Executive Branch employee violated the standards-of-conduct regulations? What types of corrective action were pursued by the OGE in such instances? Were these decisions on corrective action made by the OGE or the agency's designated agency ethics official? In such instances, did the OGE follow up to determine if action had been taken by the DAEO?
- (3) Please respond to the following questions concerning the OGE's review of financial disclosure statements submitted by nominees requiring Senate confirmation.
- (a) Please describe the process followed by the OGE in determining whether presidential nominees requiring Senate confirmation are free from conflict of interest.
 - (b) If the Director of the OGE has found possible violations of standards of conduct or other conflict-of-interest regulations by

David R. Scott, Esquire
March 14, 1985
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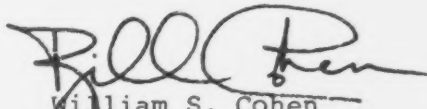
a presidential nominee, do you believe that such information should be reported to the Senate confirmation committee? Under what circumstances?

- (4) Under what circumstances do you believe that the Director of the OGE should issue public statements on ethical matters or investigations involving Executive Branch officials?
- (5) During your tenure at the OGE, did any issues arise concerning the legal basis for the confidential financial disclosure system? What was your position on the legal authority of agencies to administer and enforce this system?

I greatly appreciate your assistance to the Subcommittee in its examination of these issues. Please send your response to the Subcommittee on Oversight of Government Management, 326 Dirksen Senate Office Building, Washington, D.C., 20510 by March 28. If you have any questions, please contact Mary Gerwin of the Subcommittee staff at (202) 224-5538.

With best wishes, I am

Sincerely,


William S. Cohen
Chairman

WSC:mbg

March 28, 1985

Honorable William S. Cohen, Chairman
Subcommittee on Oversight of Government Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

April 2, 1985 Oversight Hearing
Concerning the Office of Government Ethics

Dear Mr. Chairman:

On behalf of your Subcommittee, you wrote to me on March 14, 1985, requesting that I submit written answers to certain questions you posed for the hearing on oversight of the Office of Government Ethics to be held on Tuesday, April 2, 1985. I will respond to your questions in the same order that you asked them and will try to make my answers as brief as possible.

- (1) Please describe the positions you held, with accompanying dates, at the Office of Government Ethics.

I was appointed the first Chief Counsel ("Counsellor") of the Office of Government Ethics ("OGE") in May 1980 and remained in that position until I resigned from the Government on June 8, 1984 in order to take the position of general counsel of Rutgers, The State University of New Jersey. In addition to my duties as Chief Counsel of OGE, I was also the Acting Director of that Office from September 1982 to July 1983 (after the resignation of Jack Walter and before the confirmation of David Martin).

Honorable William S. Cohen
March 28, 1985

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(2) Please respond to the following questions concerning Executive Order 11222 and regulations governing standards of conduct for Executive Branch personnel.

(a) Is conduct by an Executive Branch employee which creates the appearance of a conflict of interest a violation of Executive Order 11222 or standards-of-conduct regulations?

Yes. Both Executive Order 11222 (signed by President Johnson on May 8, 1965, 30. F.R. 6469) and the Standards of Conduct which pertain generally to the executive branch, 5CFR § 735. 101 et seq., are explicit on this point.

Section 201(c) of Executive Order 11222 states:

"(c) It is the intent of this section [201] that employees avoid any action, whether or not specifically prohibited by subsection (a), which might result in, or create the appearance of -

- (1) using public office for private gain;
- (2) giving preferential treatment to any organization or person; . . . ((3) through (6) omitted). (Emphasis added.)

Similarly, the pertinent Standard of Conduct proclaims:

"An [executive branch] employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:

- (a) Using public office for private gain;
- (b) Giving preferential treatment to any person;
- ((c) through (f) omitted)" 5 CFR § 735.201a (Emphasis added).

(b) The current OGE director, David Martin, has described Section 201(c) of the Executive Order as "aspirational" in nature. Do you agree with this interpretation?

No. As I explained above, Section 201(c) of Executive Order 11222 plainly equates an "appearance of a conflict of interest" with an actual

Honorable William S. Cohen
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conflict of interest. The violation of either would subject an executive branch employee to possible disciplinary action. The section of the Standards of Conduct which interpret section 201 (c) of the Executive Order make this point in a very straightforward manner by including "appearance" problems on an equal footing with other "proscribed actions." See 5 CFR § 735.201a entitled "Proscribed actions"

"An employer shall avoid any action, . . . which might result in, or create the appearance of:

(a) Using public office for private gain; . . . "

Finally, OGE regulations themselves state that an appearance of a violation of a standard of conduct is subject to the same administrative actions as an actual violation. See, e.g., 5 CFR § 738.203(b)(9).

(c) During your tenure at the OGE, what was the position of the OGE concerning the appearance of conflicts of interest?

As explained in (a) and (b) above, an "appearance of a conflict of interest" was necessarily by Executive Order, the Standards of Conduct and OGE Regulations put on an equal footing with an actual conflict of interest.

(d) During your tenure as Acting Director or General Counsel of the OGE, how did OGE advise designated agency ethics officials to interpret the Executive Order in situations involving the appearance of conflicts of interest? Did the OGE training programs address this issue?

In the same manner as above. This issue was addressed in OGE training programs from time to time, especially through question and answer sessions with the designated agency ethics officials who participated.

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- (e) What procedures did the OGE follow in instances where an Executive Branch employee violated the standards-of-conduct regulations? What types of corrective action were pursued by the OGE in such instances? Were these decisions on corrective action made by the OGE or the agency's designated agency ethics official? In such instances, did the OGE follow up to determine if action had been taken by the DAEO?

In its Regulations promulgated under Title IV of the Ethics in Government Act of 1978 ("the Act"), OGE set forth the procedures for the designated agency ethics official to fulfill his or her responsibility to ensure that

"[p]rompt and effective action including administrative action is undertaken to remedy:

(i) Violations or potential violations, or appearances thereof, of the agency's standards of conduct including post employment regulations;

(ii) The failure to file a financial disclosure report or portions thereof;

(iii) Potential or actual conflicts of interest, or appearances thereof, which were disclosed on a financial disclosure report; and

(iv) Potential or actual violations of other laws governing the conduct or financial holdings of officers or employees of that agency, and, that a followup is made to ensure that actions ordered, including divestiture and disqualification, have been taken; (5 CFR § 738.203(b)(9). (Emphasis added)

OGE's role is to advise and help the designated agency ethics officials fulfill this responsibility "when requested" (Section 402(b)(7) of the Act) and to order "... corrective action on the part of agencies and employees which the Director [of OGE] deems necessary" (Section 402(b)(9) of the Act). Thus, as the statutory and regulatory scheme suggests, the designated agency ethics

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official ("DAEO") would have the primary responsibility to take the corrective action but OGE would also play a role if either the DAEO requested assistance or OGE believed that some remedy or action that should have been taken by the DAEO was not. The types of such possible corrective actions varied depending upon the violation alleged -- from requiring waivers, to recusals, to divestitures, to referrals to the Department of Justice if there was a prima facie violation of a criminal conflict of interest statute. See e.g., Sections 204 and 206(b) of the Act and 28 U.S.C. § 535. OGE would follow up with the DAEO or the Justice Department to find out what action, if any, had been taken.

(3) Please respond to the following questions concerning the OGE's review of financial disclosure statements submitted by nominees requiring Senate confirmation.

(a) Please describe the process followed by the OGE in determining whether presidential nominees requiring Senate confirmation are free from conflict of interest.

In brief, the nominee's completed financial disclosure form is first submitted to the designated agency ethics official of the nominee's future employing department or agency. After the DAEO's review and personal certification on the form that it discloses no conflict of interest under applicable laws and regulations, the DAEO forwards the financial disclosure form to OGE along with an opinion letter which summarizes any problems that were encountered in the review and what steps were or will be taken to cure those problems. See 5 CFR 734.604(c). After receipt of the DAEO's opinion letter and the financial disclosure form, OGE conducts its own review which, as a matter of practice, has

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already started while the DAEO is conducting his or her review in order to expedite the whole procedure. Then, if the Director of OGE is

"... satisfied that there is no unresolved conflict, the Director shall sign the report and date the approval. The Director shall submit the report with a letter to the Senate Committee involved expressing the Director's opinion that on the basis of information contained in the report the nominee is in compliance with applicable laws and regulations." 5 CFR § 734.604(c)(3).

- (b) If the Director of the OGE has found possible violations of standards of conduct or other conflict-of-interest regulations by a presidential nominee, do you believe that such information should be reported to the Senate Confirmation committee? Under what circumstances?

Yes under certain circumstances. Those circumstances would be where such information would enable the Senate confirmation committee members to arrive at a more informed judgment in assessing the nominee's compliance in fact with all applicable laws and regulations concerning conflicts of interest. This, of course, would include the Standards of Conduct where a nominee was already subject to those regulations even before confirmation by reason of holding another position in the Government.

- (4) Under what circumstances do you believe that the Director of the OGE should issue public statements on ethical matters or investigations involving Executive Branch officials?

As I stated on a prior occasion to this Subcommittee (see pages 12 & 13 of the February 24, 1983 Hearing on S.461, S.Hrg. 98-35), I believe that a public statement by OGE is not appropriate to announce an allegation or finding

Honorable William S. Cohen
March 28, 1985

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of an ethical violation in most instances. Since OGE's primary mission is to prevent conflicts of interest and to bring executive branch personnel into compliance, the regular issuance of public statements by OGE would be counter-productive to many confidential negotiations, would reduce the amount of private information that is voluntarily supplied to it, and would discourage a large number of persons from seeking OGE's advice on potential conflicts of interest. However, I also believe that in exceptional cases OGE should issue a public statement if the Office's views were either being misinterpreted or ignored. To use the same hypothetical that I used with Senator Cohen in the February 29, 1983 OGE re-authorization hearing, I feel that the Director of OGE should issue a public statement if his or her recommendation to bring a high-level official into compliance with the conflict of interest statutes was being disregarded.

- (5) During your tenure at OGE, did any issues arise concerning the legal basis for the confidential financial disclosure system? What was your position on the legal authority of agencies to administer and enforce this system?

Yes. This issue has a long and complicated history. Suffice it to say that the Office of Legal Counsel in the Department of Justice, which has the responsibility to approve the legality of all Executive Orders for the executive branch, opined that the confidential financial disclosure system established by Part IV of Executive Order 11222 and 5 CFR § 735.401 et seq. was entirely superseded by Section 207(c) of the Ethics in Government Act of 1978. Taking this unwavering view of the Department of Justice into account, I believed that

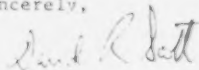
Honorable William S. Cohen
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the only practical solution to this problem was to obtain a new Executive Order under Section 207(a) of the Ethics in Government Act or failing that, to seek new legislation.

I hope that these responses to your questions will be of some assistance to you and your Subcommittee for the April 2, 1985 Oversight hearing.

Sincerely,

A handwritten signature in cursive script, appearing to read "David R. Scott".

David R. Scott

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

JAN 28 1977

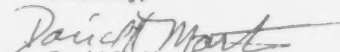
Honorable Strom Thurmond
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

Pursuant to your request, enclosed please find the staff working papers prepared by Office of Government Ethics attorneys regarding the report of the Independent Counsel on Edwin Meese III. I am providing this for your review in order that you may carry out your responsibilities regarding the nomination of Edwin Meese III to be Attorney General. This document was prepared solely at my request and direction. I instructed Mr. Davis and Ms. Feathers to make a thorough review of all allegations so that I might carry out my responsibilities under the Ethics in Government Act. Following the preparation of this working paper, my staff and I engaged in a robust, open and free exchange of the conclusions contained in this paper. This open exchange in the preparation of papers such as this, and in subsequent discussions, is an essential part of the fair and proper functioning of this Office. The working papers, therefore, are confidential and I am most reluctant to make a general release of them. Would you please, therefore, limit access to this working paper such that your committee can accomplish its responsibilities.

This working paper obviously does not represent the final decision-making act of the office, nor does it represent the final conclusions reached by the authors. The conclusions reached by Mr. Davis and Ms. Feathers were discussed at length over a number of days with me and my Chief Counsel, Donald Campbell. After very frank and open discussions, I concluded, any my staff agreed, that no conflicts of interest existed and that only one of the allegations rose to the level of a violation of the standards of conduct. That one violation involved what we term an "appearance problem" involving the loan arranged by John R. McKean for Mr. Meese and the subsequent participation by Mr. Meese in the appointment of Mr. McKean to a full-term position on the Board of Governors of the Postal Service. The standards of conduct for the Executive Office of the President, which are aspirational in nature, at 3 C.F.R. §100.735-4 provide that employees shall avoid any action . . . which might result in, or create the appearance of, losing complete independence or impartiality. The fact that Mr. McKean arranged a loan for Mr. Meese on two separate occasions and that Mr. Meese was one of four persons who approved Mr. McKean for an executive branch appointment, created the appearances which the standards of conduct caution against. Although an appearance problem was created by this set of facts, it was incumbent upon me to look behind the appearance to determine if there was any substance to the appearance. Based on the facts as developed, I satisfied myself that this was an appearance problem only, that the loans in question were arms-length transactions, and that there existed credible explanations for the actions of both Mr. McKean and Mr. Meese independent of their financial relationships.

Sincerely,


David H. Martin
Director

Enclosure

Excerpt From Testimony of David H. Martin, Esq.,
Director, Office of Government Ethics, Before the
Senate Committee on the Judiciary, at the nomination
hearing of Edwin Meese III, January 31, 1985.

The Chairman. Thank you. Now Mr. Martin, do you have a statement?

You understand what this hearing is all about?

Mr. Martin. Yes. I do, Senator. I have a brief--

The Chairman. And you have been requested to come and testify here.

And do you have a statement you would like to present to the Committee?

Mr. Martin. I have a brief statement, some notes that I put together,
that I would, Senator.

The Chairman. All right. You may proceed.

Mr. Martin. Thank you. I would like to take this opportunity to
explain to you what we do in the Office Of Government Ethics, when
confronted with what we call an appearance problem. As you know, there
is a rule in the Executive Branch regarding appearances, whose coverage
is very broad. It provides that an employee should avoid any actions
which might result in, or create the appearance of a number of things,
and let's call them an impropriety, for now. Might result in or create
the appearance. This rule is aspirational in nature. That is, we all
try to avoid that, creating an appearance, but as we know in the public
sector, that is often difficult to do. Our attitude is, when there is
an appearance problem, that the persons involved have done no wrong,
have committed no improprieties, and are presumed to have acted ethically.

It is an appearance only. However, the job of the Agency ethics
official, and those of my staff, is to determine whether or not there
is any substance or reality to the appearance. If there is not, there
has been no violation of the standards of conduct, except the broad-based
rule, which I read to you, which cautions against creating an appearance.
We should all, in the public sector, strive to avoid appearances of
impropriety.

Excerpt From Testimony of David H. Martin, Esq.,
Director, Office of Government Ethics, Before the
Senate Subcommittee on Defense Acquisition Policy
of the Senate Committee on Armed Services, May 19, 1985.

Senator Quayle: Do you have jurisdiction over actual
cases that are filed alleging conflict of interest or
violations of standards once they leave Government?

Mr. Martin: That is a Department of Justice function.
We do interpret that law along with the Department of
Justice.

Senator Quayle: Your function is basically prospective;
is that right?

Mr. Martin: Yes, it is.

Senator Quayle: In other words, you don't have a handle
on how many cases have been filed or allegations that have
been made?

Mr. Martin: Under 207?

Senator Quayle: Yes.

Mr. Martin: There are not many. My recollection is
maybe one or two prosecutions. It is limited. It may be
because we are dealing with it before it occurs.

Senator Quayle: If we are dealing with it before it
occurs, that is fine with the law.

The question is whether we need to tighten up the law or
expand the prohibitions. There has been conflicting
testimony today. You have sat and listened for the last two
and a half hours of testimony.

From your viewpoint, do you have any advice about areas that we ought to give additional clarification to that might be helpful to you in giving counsel to people who are going out to the private sector?

Are there some gray areas that might need some tightening up?

Mr. Martin: I agree with much of the testimony about the subjective influence. I do believe it exists, but I don't know how to deal with it. I think you cannot make an appearance problem a violation of law. I think it is unenforceable.

I think there are certain constitutional freedoms of association problems with restricting where you can go to work and for whom you may associate when you leave the Government. I think it would be counterproductive to limit, certainly as Senator Glenn suggests, going into an industry or even to prohibit somebody from going to work for a company.

The furthest I would go in that area is to maybe prohibit somebody as we do in the legal profession now, through bar association rules, prohibit somebody who has had substantial participation in the Government from going and participating in a matter in that company.

But how would you ever enforce that, I don't know. I don't know how you would. It is just like now these laws we have on the books are difficult to enforce once somebody leaves the Government.

(Statement made by David H. Martin)

May 19, 1985

SUBCOMMITTEE ON DEFENSE ACQUISITION POLICY
OF THE SENATE COMMITTEE ON ARMED SERVICES

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I APPRECIATE THE INVITATION TO APPEAR BEFORE THIS SUBCOMMITTEE TO ANSWER QUESTIONS WHICH THE COMMITTEE MEMBERS MAY HAVE ON LIMITATIONS ON POST-GOVERNMENT EMPLOYMENT, OR THE SO-CALLED "REVOLVING DOOR" ISSUE. I WOULD PROVIDE THE FOLLOWING OBSERVATIONS.

AS YOU ALL KNOW, THE ETHICS IN GOVERNMENT ACT WHICH WAS SIGNED INTO LAW ON OCTOBER 26, 1978, WAS ENACTED TO PRESERVE AND PROMOTE THE INTEGRITY OF PUBLIC OFFICIALS AND INSTITUTIONS. TITLE V OF THE ACT AMENDED TITLE 18 U.S.C. SECTION 207, CRIMINAL PROVISIONS DESIGNED TO DISQUALIFY FORMER OFFICERS AND EMPLOYEES FROM PARTICIPATING IN MATTERS RELATING TO THEIR PREVIOUS OFFICIAL ACTIVITIES AND RESPONSIBILITIES. SECTIONS 207(A) AND (B) ARE DESIGNED TO PREVENT ANY FORMER EMPLOYEE FROM "SWITCHING SIDES" AND REPRESENTING A PRIVATE CLIENT IN THE SAME MATTER FOR WHICH HE HAD PREVIOUSLY REPRESENTED THE GOVERNMENT. SECTION 207(C), SINCE IT IS NOT LIMITED TO MATTERS IN WHICH THE EMPLOYEE WAS INVOLVED, RESTS ON A DIFFERENT THEORY. IT INTERDICTS ATTEMPTS BY FORMER HIGH-RANKING EMPLOYEES TO EXERCISE INFLUENCE OVER THEIR FORMER COLLEAGUES AND SUBORDINATES. A PUBLIC POLICY-MAKER WHO LEAVES OFFICE IS NOT PERMITTED TO BENEFIT FROM HIS GOVERNMENT EXPERIENCE BY EXPLOITING ANY "CLOUT" WITH HIS FORMER AGENCY FOR ONE YEAR.

POST-EMPLOYMENT RESTRAINTS SHOULD ACCOMMODATE THE NEED TO ATTRACT AND RETAIN A QUALIFIED AND EXPERIENCED WORK FORCE AND SHOULD RECOGNIZE THAT THERE ARE ADVANTAGES ASSOCIATED WITH THE MOVEMENT OF EMPLOYEES BACK AND FORTH BETWEEN GOVERNMENT AND THE PRIVATE SECTOR. THE GOVERNMENT COULD INSIST UPON A STRICT STANDARD OF SEPARATION BETWEEN ITS EMPLOYEES AND THE PRIVATE ECONOMIC WORLD, IF IT KEPT GOVERNMENT AND NON-GOVERNMENT OPERATIONS CLEARLY SEPARATE. IN THE PRESENT SYSTEM, WE DO NOT. WE STAFF OUR POSITIONS WITH TEMPORARY IN-AND-OUT APPOINTEES. WE CONTRACT OUT BIG GOVERNMENT JOBS — AND THEN MUST FIND LIAISON MEN TO BRIEF BOTH SIDES. WE HAVE DELIBERATELY CONSTRUCTED INSTITUTIONS OF DUAL, OR BLENDED LOYALTIES, AND MUST BE PREPARED TO LIVE WITH THE POTENTIAL CONFLICT OF INTEREST CONSEQUENCES. THE RESULT IS THAT ANY PROGRAM OF RESTRAINTS FOR THE GOVERNMENT MUST BE CONTENT WITH APPROXIMATIONS. THERE MUST BE A PROPER BALANCING BETWEEN MAINTAINING INTEGRITY AND ENSURING AN ABLE WORK FORCE.

I WOULD LIKE TO CLOSE MY REMARKS WITH A SIMPLE QUOTE WHICH HAS BEEN ATTRIBUTED TO BAYLESS MANNING, ONE OF THE FOREMOST COMMENTATORS IN THIS FIELD OF LAW. MR. MANNING SUGGESTED THAT "PLATO'S PHILOSOPHER KINGS COULD ISOLATE THEMSELVES FROM PRIVATE INTERESTS: AMERICA'S DEMOCRATIC GOVERNMENT CANNOT." I WOULD HOPE THAT THIS THOUGHT WOULD ASSIST THE COMMITTEE IN THEIR DELIBERATION HERE THIS MORNING.

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

83 x 20

Letter to an Agency Attorney dated 12/30/83

This is in response to your request dated December 12, 1983, for our opinion on the applicability of 18 U.S.C. § 208(a) in relation to an employee of your agency in the field of data processing, and his wife.

It appears from the information you supplied with your request that the [employee's wife] is, to use [the employee's] term, a "self-employed consultant" to [a] firm which has two contracts with your Agency — one to provide services in support of an ADP/software project known as [Project 1], and a second to provide services in a project known as [Project 2]. [The employee's] characterization of his wife's relationship with [the firm], is substantiated by the terms of the Consultant Agreement she and [the firm] executed [in July, 1983].

The information you furnished also discloses that [the firm] has assigned [the wife] to provide "a data entry component" for [Project 1]; that [the employee, in his government capacity,] has a significant role as an adviser to [Project 1]; and that he is also involved, although to a lesser extent, in [Project 2]. However, it is not apparent whether [the employee's wife] is providing services to [Project 2].

Section 208(a), insofar as pertinent here, bans an employee of the federal Government from participating personally and substantially in a "particular matter in which, to his knowledge, he, his spouse [or any of certain other persons] has a financial interest". (Underlining added). Presumably your agency's contracts with [the firm], regarding [Projects 1 and 2] are separate undertakings and therefore are two "particular matters" for the purposes of § 208(a).

[The employee's wife's] role in [Project 1] is essentially that of a subcontractor of [the firm], as distinguished from an employee of the latter. Accordingly, like [the firm], she has a financial interest in the [Project 1] matter. We are therefore of the opinion that if [the wife] were to continue her work on [Project 1, the employee] would be in violation of § 208 (a) and thus required to recuse himself from that matter. Under 18 U.S.C. § 208(b) the agency may grant [the employee] a waiver of the criminal restrictions if it determines that such a waiver is appropriate. Notwithstanding such a waiver, however, we are of the opinion that [the employee's] continued work on the [Project 1] matter under these circumstances raises a clear appearance of impropriety which can not be overcome by simply using the waiver powers granted to the agency.

[The employee] may carry out his responsibilities relative to [Project 2] without contravening § 208(a) as long as [his wife] does not perform services for that project. That state of affairs would not be altered were he to recuse himself from [Project 1].

I trust that the foregoing discussion will be of guidance to you in resolving this matter.

Sincerely,

David H. Martin
Director

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

84 x 6

Letter to an Agency Counsel dated 05/01/84

This is in response to your letter of April 2, 1984, presenting for our consideration a suggestion intended to permit [an employee's] continued participation in [a] project in your agency with the concomitant rendering of services to [a private contractor on the project] by [the employee's] wife in the role of a part-time "retainer" of that company with a predetermined total remuneration rather than in the role of an independent contractor. Although your letter does not aver that [the employee's wife] would or would not provide a "data entry component" for [the project] (see our letter of December 30, 1983, [numbered 83 x 20]), we assume that she would perform duties of that nature or other duties connected with [the project].

You ask specifically whether the proposed "form of retainer arrangement" described in your letter "could operate to remove any financial interest the [couple] would have in the existence or continuation of... the [company's] contract relating to the project?" Assuming that the terms of the "retainer arrangement" realistically placed [the employee's wife] in the role of an employee of [the company], as distinguished from her present role as an independent contractor, she would no longer have a "financial interest" in the [project contract] and therefore her change of status would lift the bar of 18 U.S.C. 208(a) against the concomitant participation of her husband in that matter. This result is the same as the one that could be alternatively achieved, notwithstanding [the wife's] continuance as an independent contractor, by your agency's grant of a waiver to [the employee] under 18 U.S.C. 208(b), a possibility we noted in our December 30th, 1983, letter to [your agency]. However, your present suggestion, like the grant of a waiver, would fail to deal with the problem we noted in that letter — that is, the appearance of impropriety. Regarding that problem, it is not the nature of the financial arrangement between [the employee's wife] and [the company] that is crucial; rather it is the husband-wife relationship which gives rise to the adverse appearance — that is, to the suggestion that [the employee] might lose his objectivity in performing his duties with regard to [the project] by reason of his wife's services on behalf of [a company with a government contract to perform services] in connection with that same project.

Finally, we do not believe the analogy you draw in the third paragraph of your letter is apt. The payment of a salary instead of the grant of a partnership interest to a lawyer who has left the service of the Federal Government for practice as a principal in a law firm is a means of avoiding the specific prohibition of 18 U.S.C. 203 against a former Government employee's sharing in compensation received by another person or entity for services rendered before any federal agency during the former employee's tenure with the Government. The presence or absence of an untoward appearance if he or she were to be made a partner and share in the firm's receipts would be irrelevant for purposes of 18 U.S.C. 203.

I trust that you will find this discussion helpful in advising [the employee].

Sincerely,

David H. Martin
Director

DAVID B. MOFFER
v.
DEPARTMENT OF THE INTERIOR

DOCKET NO.
DA075209208

OPINION AND ORDER

The appellant was removed from his GS-12 Realty Specialist position in the Bureau of Indian Affairs for violations of laws and regulations prohibiting employees from trading with Indians, engaging in a financial transaction resulting from or relying on information obtained through his government position and using his office for private gain. He appealed the decision and following a hearing the presiding official found that appellant had technically violated 25 U.S.C. § 68¹ by purchasing land with his wife from an Indian, but that the appellant's involvement in the transaction was only a passive one, that the Indian seller, a college graduate, was the cousin of the appellant's wife, that the seller initiated the transaction to keep the property in the family, that the sale price was the appraised value of the property, that the appellant acquired no gain as a result of the transaction, that the appellant's involvement was limited to endorsement of the financial instrument as his wife's husband, and that, upon being informed that the transaction violated the statute, the appellant conveyed his title to his wife, thereby divesting himself of his interest in the property. The presiding official found that, with the exception of the technical violation, the agency had failed to sustain its burden of proving that the appellant had violated other regulations regarding misuse of information and misuse of his office for personal gain. He concluded that, although the statute technically was violated, the "spirit, intent and purpose of the statute were not violated." Accordingly, he found that the removal would not promote the efficiency of the service and reversed the agency action.

In its petition for review the agency argues that the presiding official erroneously interpreted law and regulation. Specifically, it states that the removal action was mandatory and could not be mitigated, as the appellant had violated the law prohibiting trading with Indians and that the presiding official had misconstrued agency

¹Pub. L. 96-277, 94 Stat. 544 (June 17, 1980) repealed 25 U.S.C. § 68. The offense with which the appellant was charged is now covered by 18 U.S.C. § 437. While under 25 U.S.C. § 68 the ban against trading with Indians applied to all federal officers, employees and agents, under 18 U.S.C. § 437 the trade restriction applies only to employees of the Bureau of Indian Affairs and the Indian Health Service. S. Rep. No. 96-629, 96th Cong., 2d Sess. (1980). Since the appellant was an employee of the Bureau of Indian Affairs, the new law would not affect the charge brought against him.

regulations and the law relative to the agency's trust responsibility toward Indians.²

The petition for review is GRANTED.

We find error in the presiding official's conclusion with respect to the agency's third charge relating to the appellant's alleged misuse of his office for private gain. In this respect, the appellant was charged with violating 43 C.F.R., Part 20, Section 735-32(d)(1), which provides, in pertinent part:

An employee must avoid action, whether or not specifically prohibited by this subpart, which might result in, *or create the appearance of*:

1. Using public office for private gain; [Emphasis added.]

In reaching his decision on this charge, the presiding official discussed the evidence and concluded that the agency had failed to prove that the appellant had used his office for private gain. However, he erred in failing to consider *or* rule on whether the appellant, in knowingly engaging in a real estate transaction with the Indian seller, created the appearance of using his office for private gain. 5 C.F.R. § 1201.111(b)(1). The record clearly supports a finding that the appellant's participation in the transaction created the appearance of his use of his federal office for private gain. Such conduct was prohibited under the agency's regulations. Accordingly, we REVERSE the presiding official's finding that the agency had failed to support the third charge by a preponderance of the evidence.

In discussing the efficiency of the service standard under 5 U.S.C. § 7513(a) with respect to the first charge, the presiding official found that, while the appellant had technically violated 25 U.S.C. § 68, he did not violate the spirit, intent and purpose of the statute. We disagree. That section provides, in pertinent part:

No person employed in Indian affairs shall have *any interest or concern in any trade with the Indians*, except for, and on account of, the United States. [Emphasis added.]

²The agency further alleges in its petition for review that the presiding official initially deemed it unnecessary to call as a witness the agency's supervisory appraiser who could have testified with respect to the value of the land and then proceeded to accept an incorrect appraisal for the property as a basis for his finding that the appellant made no gain as to the transaction. At the hearing the presiding official noted that during conversations prior to the hearing the agency's representative indicated that he would call only two of the five requested witnesses. The supervisory appraiser was one of those witnesses not called. Transcript at 6. The agency did not object to this account of the circumstances surrounding the failure to call the supervisory appraiser. Accordingly, we find that the record fails to support the allegation that the presiding official was responsible for the supervisory appraiser's failure to testify.

The courts have consistently given strict interpretation to this provision over a long period of time. Thus, the Supreme Court, in *United States v. Hutto*, 256 U.S. 524, 528 (1921), stated that "it manifestly was and is designed to insure integrity of conduct on the part of all persons employed in Indian affairs, and an impartial attitude towards the Indians, by excluding from persons so employed all motives of personal gain, so that the duty of the United States as trustee for these dependent peoples, recognized wards of the government, might be performed with a single regard for their interests appropriate to the fiduciary relation." See also *Ewert v. Bluejacket*, 259 U.S. 129, 137 (1922); *Kendall v. Ewert*, 259 U.S. 139 (1922); *United States v. Douglas*, 190 F. 482 (C.A. 8 1911).

As noted in footnote 1, *supra*, 25 U.S.C. § 68 was repealed on June 17, 1980, by the enactment of Public Law 96-277. The ban against trading with Indians was liberalized somewhat, so that it no longer was applicable to all federal officers, employees and agents, but only those employed by the Bureau of Indian Affairs and Indian Health Service. The legislative history of Pub. L. 96-277 reveals that the Senate Select Committee on Indian Affairs to which H.R. 3979 had been assigned following House passage of the bill adopted an amendment based upon information furnished to the committee by the Standing Rock Reservation Landowners Association which indicated that 22.3 percent of the Standing Rock land purchased between 1964 and 1978 was purchased by Bureau of Indian Affairs employees or their relatives and that "Indian [Bureau of Indian Affairs] employees in the realty branch showed preferential treatment to their relatives, their friends, friends of friends, or other employees and that this has served as a hindrance to effective utilization of lands on the Standing Rock Reservation." S. Rep. No. 96-629, 96th Cong., 2d. Sess. (1980).

To guard against such abuses the bill was amended to retain the ban against trade between Indians and persons employed by the Bureau of Indian Affairs and the Indian Health Service, and to allow employees to have an interest in the purchase or sale of trust property only if approved by the Secretary or his designee. *Id.* Public Law 96-277 was enacted with this amendment. 94 Stat. 544.

Although 25 U.S.C. § 68 was repealed after the action involved in the instant case, Congress, by amending 18 U.S.C. § 437 to provide for the continuation of the ban, in effect, reaffirmed the courts' strict interpretation of the ban against such action by BIA employees.

Here, as a Realty Specialist in the Bureau of Indian Affairs, appellant stood in a fiduciary relationship with Indians whose interests he was employed to protect. In purchasing the land from an Indian, the appellant clearly engaged in conduct against which the provision was designed to protect. Moreover, the appellant served on the agency's Land Sale Committee which recommends approval of

applications for patents in fee which are necessary before trust property can be sold. Transcript at 25. Thus, we find, as did the presiding official, that the "appellant's cries of ignorance of the law must be judged with an appropriate dosage of salt." Initial Decision at 5-6.

Nor are we persuaded by the appellant's arguments that his ownership in the land was merely incidental to that of his wife. In fact he admitted that he had a one-half interest in the land. Transcript at 127. Moreover, although he did note his interest in the property to the agency by completing an annual disclosure statement which was approved by the Ethics Officer, the record indicates that the Ethics Officer is located in an office about 150 miles away, *Id.* at 124, and there is nothing contained in the statement which would have alerted the Ethics Officer that the land was newly purchased or would otherwise have identified the land as trust property. *Id.* at 123-A-124.

Furthermore, contrary to the presiding official's conclusion, the fact that the appellant conveyed his interest in the land to his wife by quitclaim deed upon being advised by the agency that the sale violated the statute does not lessen the seriousness of his actions or cure the violation. Thus, 43 C.F.R. § 20.735-15, which prohibits an employee from having a direct or indirect interest which conflicts with his duties defines "direct interest" as including the holdings of a spouse. Agency Exhibit No. 1.

Thus, we find that the charges are supported by the evidence and they are sustained. 5 C.F.R. § 1201.56(a)(ii).

In his initial decision the presiding official concluded that the removal penalty in this case would not promote the efficiency of the service. We disagree. In *Douglas v. Veterans Administration*, 5 MSPB 313,329 (1981), the Board recognized "the agency's primary discretion in exercising the managerial function of maintaining employee discipline and efficiency," but held that the Board must assure that the agency's judgment was exercised reasonably. A penalty should be selected only after a careful weighing and consideration of factors relevant to that determination. *Id.* at 331-32. In the circumstances of this case, we find no impropriety in the penalty selected. In fact, given the seriousness of the offense committed, the penalty of removal mandated by 25 U.S.C. § 68 and the consistently strict interpretation of the statute by the courts with Congressional approval, the agency could not properly have chosen a lesser penalty. *Woody v. General Services Administration*, 6 MSPB 410, 411 (1981).

Accordingly, the initial decision of the presiding official is REVERSED and the agency action is hereby SUSTAINED.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. 1201.113(c).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

WASHINGTON, D.C., October 14, 1981

WILLIAM A. BURNETT
v.
U.S. SOLDIERS' AND AIRMEN'S HOME

DOCKET NOS.
DC07528110429
DC07528110298

OPINION AND ORDER

This case comes before the Board on the agency's petition seeking review of two initial decisions which reversed appellant's emergency suspension and removal from the position of a GS-6, Health Care Technician. The Office of Personnel Management has intervened on behalf of the agency.

The basic contention in both the agency's petition for review and the intervenor brief is that the presiding official came to erroneous conclusions based upon the evidence of record and the applicable standard of proof. Both the agency and the Office of Personnel Management strongly urge that we look again at the record evidence in light of the nature of the charges against the appellant.

We hereby reopen on our own motion pursuant to 5 C.F.R. § 1201.117 to review the evidence of record. These cases are hereby joined pursuant to 5 C.F.R. § 1201.36(a)(2).

We note at the outset that we will review the evidence of record in connection with the question of appellant's removal. Although the presiding official reversed the emergency suspension based on the merits, it is clear that this suspension could not be sustained under the Board's decision in *Cuellar v. U.S. Postal Service*, 8 MSPB 282, 287 (1981). In that decision, the Board held that the emergency suspension provisions of 5 C.F.R. § 752.404(d)(3) are invalid insofar as they conflict with 5 U.S.C. § 7513(b)(1), which requires 30 days' advance notice, "unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed."¹ In the instant case, the agency provided less than 30 days' notice for a suspension of more than 14 days and did not invoke the crime provision. The notice simply stated that appellant's retention on duty would be "injurious to patients," Tab 24. Thus the presiding official's decision with regard to the emergency suspension is affirmed as modified herein.²

There is little dispute with regard to the facts in this case. Basically, the record shows that from a period beginning October

¹Pursuant to 5 U.S.C. § 7512(2) a suspension for more than 14 days is an adverse action subject to the provisions of 5 U.S.C. § 7513.

²See Initial Decision, *Burnett v. U.S. Soldiers' and Airmen's Home*, MSPB Docket No. DC07528110429 (April 14, 1981).

1979 through October 1980, appellant cashed some thirteen checks made out either to him or to "cash" for a member of the Home, the then 84 year old, Mr. Glenn Bird. The total of the checks cashed amounted to some \$1,500, and \$1,100 of that amount was cashed between August and October 1980. At the time, Mr. Bird continued to obtain cash through the regular channels, that is, through personnel of the agency's finance office whose duty it was to attend to the financial needs of members who had ambulatory or other difficulties in going to the bank. (These cancelled checks had come to the agency's attention when a search for another check, not here relevant, was made with Mr. Bird's consent by agency security officials.) When first questioned about these checks, appellant stated they were repayments for loans he had made to Mr. Bird. However, he later recanted and indicated that he had cashed these checks for Mr. Bird as a favor due to their friendship of over twenty years.³

The agency charged appellant with having made loans and cited all thirteen transactions. The agency charged that these transactions violated several sections of 5 C.F.R. part 735 as well as several agency rules implementing the regulations in part 735. (See, notice of proposed removal, Tab 26.) The presiding official found that appellant had not made loans to Mr. Bird and that the check cashing transactions in and of themselves did not violate any of the cited rules and regulations. Both the agency and the OPM argue before the Board that regardless of whether the transactions involved loans or not, the cited rules and regulations were violated.

We note that the gravamen of some of the cited rules and regulations involves illegal financial gain. See, e.g., 5 C.F.R. § 735.202(a)(3) and certain items in the agency Employee Handbook, Part III, Table of Offenses and Penalties cited in the proposed notice of removal at 3.⁴ Others involve conduct which might result in or create the appearance of using public office for illegal gain, 5 C.F.R. § 752.201a(a). Still others involve affecting adversely the confidence of the public in the integrity of the Government, 5 C.F.R. § 735.201a(f), and or lack of trustworthiness, Part III, Table of Offenses and Penalties, pages 8-14, item 46.

From our review of the initial decision of the presiding official, it appears that her finding that the charges against appellant were not

³Evidence of record shows that Mr. Bird was a long term member of the Home, and frequently encountered appellant in the "GU" clinic where appellant worked and Mr. Bird received treatment.

⁴5 C.F.R. § 735.202(a)(3) prohibits solicitation of anything of monetary value from a person who has interests that may be affected by the performance or nonperformance of official duty. Part III, Table of Offenses and Penalties, Page 8-7, item 5, prohibits acceptance by an employee of a gratuity which might reasonably be interpreted as tending to affect the performances of his official duties. Page 8-16, item 53, prohibits accepting any money in any form.

supported by a preponderance of evidence³ is largely based upon her conclusion with regard to the matter of illegal financial gain on the part of appellant. See, initial decision at 3. In this respect, the contention in OPM's intervenor brief that the presiding official did not make findings on all of the charges is correct, as she did not specifically make findings with regard to the cited rules and regulations not pertaining to financial gain *per se*.

Insofar as the presiding official's finding with respect to appellant's financial gain is concerned, we affirm that finding. There is no evidence in the record supporting appellant's financial gain. In both an interview with agency officials and in his later deposition, Mr. Bird said he always signed the checks and appellant always brought the money back to him. It has in no way been established in the record that Mr. Bird was not mentally alert or that he did not really know whether all of the money was returned.

As far as the charges relating to public confidence or general lack of trustworthiness are concerned, we also find insufficient evidence in the record to support these. There is no evidence that anyone in the public or present on the agency premises considered appellant unreliable. Appellant had an unblemished record of over 20 years of service with the agency. The mere charges without more are not sufficient to establish violation of the public trust.

In our view, the only violation of rule or regulation sustainable by the transactions on their face is the violation of the regulation found at 5 C.F.R. § 735.201a(a), which provides in pertinent part:

An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or *create the appearance of*: (a) using public office for private gain. (Emphasis added.)

Here we have a situation where appellant cashed checks for a member of the Home as a favor. However, there is no explanation in the record of why the appellant started doing this as a favor in 1979 when it appears he had not done it previously. There is also no explanation why Mr. Bird needed money in addition to that obtained for him by officials in the finance office. Further, Mr. Bird seems to indicate that no checks were made out for more than \$100.00 whereas two are for \$200.00. It is also unclear why, if appellant's check cashing for Mr. Bird was totally honest, appellant lied about the fact that these checks were repayment for loans, although appellant stated he was frightened and felt coerced by the agency in the initial interview concerning the checks. Finally, it is unclear why so many checks were cashed between August and October, 1980.

³That is, evidence to support a conclusion that the matter asserted is more likely to be true than not true. 5 C.F.R. § 1201.56.

These circumstances do not, in our view, compel us to a conclusion that appellant took money from Mr. Bird. While, as the agency and the OPM point out, they are somewhat suspicious in nature, it is also clear that the alternative explanations are quite possible. Indeed, the evidence of record before us contains nothing to show that appellant took money or in any way actually profited from these transactions. Thus, it is not clear that the matter asserted (illegal gain) is more likely to be true than not true. *See, n.5 supra.*

Nonetheless, as set forth above, the circumstances of the transactions could be said to create the appearance of using public office for private gain. Therefore, we sustain the charge that the transactions occurred and that 5 C.F.R. § 735.201a(a) was violated.

Turning to the question of the appropriate penalty, in our judgment, removal would be too harsh and disproportionate to the offense, based on the record before us. Appellant has been employed at the agency for over 20 years, and he has a previously unblemished record. Furthermore, the record does not establish that appellant actually did anything wrong, but merely created the appearance of wrongdoing. The record before us also fails to show that appellant knew that cashing checks as a favor to Mr. Bird, which appellant states was done at lunch time, or after duty hours, could create the appearance of wrongdoing and/or represent a conflict of interest. In instances where the Board has upheld the penalty of removal based upon a conflict of interest, the sustained charges have been far more egregious and flagrant than the sustained charges which the record support in this case. Cf., e.g., *Wild v. U.S. Department of Housing and Urban Development*, 7 MSPB 434 (1981) and *Smith v. Department of the Interior*, 6 MSPB 82 (1981).

Nevertheless, we have found a regulatory violation representing actionable misconduct. Therefore, we impose a 30-day suspension upon the appellant in order to deter future conduct of this type.⁹

As set forth above, the initial decision overturning the emergency suspension is affirmed as modified herein. The initial decision reversing the adverse action of removal is vacated, and a portion of the charge is sustained, but the penalty of removal is mitigated to a 30-day suspension. The agency is hereby ORDERED to reinstate appellant, cancel the emergency suspension and substitute in lieu of removal, a 30-day suspension. Proof of compliance with this order shall be submitted by the agency to the Office of the Secretary of the Board within 20 days of the date of issuance of this order. Any petition for enforcement of this order shall be made to the Board's

⁹See *Douglas v. Veterans Administration*, 5 MSPB 313 (1981), which sets forth, at 331-32, these and other factors for consideration in determining whether the agency imposed a reasonable penalty.

Washington, D.C. Regional Office in accordance with 5 C.F.R. § 1201.181(a).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court⁷ no later than thirty (30) days after appellant's receipt of this Order.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., September 17, 1982



Congressional Research Service
The Library of Congress

Washington, D.C. 20540

THE APPEARANCE OF IMPROPRIETY AS A STANDARD FOR
DISCIPLINING FEDERAL EMPLOYEES

Jack Maskell
Legislative Attorney
American Law Division
March 29, 1985

EXECUTIVE SUMMARY

This report discusses whether or not the standard of conduct requiring employees to avoid certain actions which may create the "appearance of impropriety", or the "appearance" of a conflict of interest or the use of one's office for personal gain, may be used and is used as a basis for disciplining federal employees, including removal of federal employees from office.

The standard of conduct in question derives substantially from Executive Order No. 11222, and is embodied, as required, in the regulations of the Office of Personnel Management and all agencies of the executive branch of government.

It appears from practice and instructions that this standard of conduct is used as a basis for disciplining federal employees for "cause", including removal and suspension for "such cause as will promote the efficiency of the service". 5 U.S.C. § 7315(a). See Federal Personnel Manual, Office of Personnel Management, Ch. 752, Part 3-2, Paragraph (c).

Decisions from the Merit System Protection Board, reviewing the disciplining of federal employees, have upheld the removal or other discipline of employees based upon findings that the employee's conduct created the "appearance" of certain improprieties. Moffer v. Department of Interior, 8 MSPB 134 (1981); Burnett v. U.S. Soldiers' and Airmen's Home, 11 MSPB 559, 561-562 (1982); Miller v. United States Postal Service, 7 MSPB 413, 414 (1980). In the Moffer decision, the Board specifically found error in the presiding officer's earlier decision because of the failure of the officer "to consider or rule on whether the appellant . . . created the appearance of using his office for private gain". Moffer, *supra* at 135.

Federal court decisions have also upheld the removal and discipline of federal employees based on violations of conduct standards requiring the avoidance of activities which may create the "appearance" of certain improprieties. Lowery v. Richardson, 390 F. Supp. 356, 359 (E.D. Okla. 1973); Jones v. United States, 617 F.2d 233 (Ct. Claims 1980); see also Wild v. U.S. Dept. of HUD, 692 F.2d 1129, 1131 (7th Cir. 1982), United States v. Kenealy, 646 F.2d 699, 704 (1st Cir. 1981), Gulf & Western Industries, Inc. v. United States, 671 F.2d 1322, 1325-1326 (Ct. Claims 1982), and Wathen v. United States, 527 F.2d 1191 (Ct. Claims 1975) concerning violations of general standards of conduct in agency regulations and the "appearances" such conduct creates as to causes of action. The court in Lowery v. Richardson, *supra*, quoting from the decision of the former Civil Service Board of Appeals and Review, agreed that "it is the appearance of impropriety in such relations that more than anything else creates the cause of action." 390 F. Supp. at 359.

Issues may arise as to the "vagueness" of the "appearance" standard if the activity or conduct in question does not involve employment, financial interests or the receipt of gifts or things of value, but instead

involves activity protected by the First Amendment. In such cases, courts have found that regulations on First Amendment rights require a greater deal of specificity and precision than do regulations on economic rights. Keeffe v. Library of Congress, 588 F. Supp. 778, 789-790, appeal docketed No. 84-54 64 (D.C. Cir.), citing Grayned v. City of Rockford, 408 U.S. 104, at 109 (1972); also Smith v. Goguen, 415 U.S. 566, at 573, note 10 (1974).

Additionally, the "appearance of impropriety" standard may not prove actionable in cases brought by private parties, rather than disciplinary measures initiated by the government, to set aside, for example, the awarding of a contract or to overturn an agency decision to allow an employee to work on a particular governmental matter. CACI, Inc. - Federal v. United States, 719 F. 2d 1567 (Fed. Cir. 1982); Center for Auto Safety v. F.T.C., 586 F. Supp. 1254 (D.C.C. 1984). However, as to disciplinary measures brought by federal agencies against employees under the "appearances" standards of federal regulations, the courts have allowed a great deal of discretion to the agencies and the executive branch in such personnel matters, generally reviewing such disciplinary proceedings merely for procedural irregularities, to determine whether the facts are supported by substantial evidence, or for arbitrary and capricious conduct on behalf of the government. United States v. Jones, supra at 236; Wild v. HUD, supra at 1133-1134; Wathen v. United States, supra at 1200-1201, 1203.

THE APPEARANCE OF IMPROPRIETY AS A STANDARD FOR
DISCIPLINING FEDERAL EMPLOYEES

This report discusses whether or not the "appearance of impropriety", or the "appearance" of a conflict of interest or use of one's office for personal gain, is and may be used as a basis for disciplining federal employees, including removal from federal service.

The standard of conduct, the avoidance of appearances of improprieties or the appearances of conflicts of interest or using federal office for one's personal gain, derives substantially from Executive Order Number 11222, Sections 201(c), 202, and 203.^{1/} Under the authority of this Executive Order (Section 701), the Office of Personnel Management is instructed to issue standards of conduct for all federal employees implementing the guidelines and standards expressed in the Executive Order. The OPM regulations reiterate the basic standard of conduct with respect to avoiding actions which may result in or "create the appearance of": using public office for personal gain, impeding government efficiency or economy, losing complete independence or

^{1/} 30 F.R. 6469, May 8, 1965, as amended by Executive Order No. 11590, April 23, 1971, 36 F.R. 7831, and Executive Order No. 12107, December 28, 1978, 44 F.R. 1055. See now 18 U.S.C. § 201, note.

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impartiality, making a government decision outside of official channels or affecting adversely the confidence of the public in the integrity of the government. 5 C.F.R. § 735.201a. The OPM regulations further restrict outside compensation, gifts, or payments of expenses "in circumstances in which acceptance may result in, or create the appearance of, conflicts of interest . . ." (5 C.F.R. § 35.203(a)); and prohibit financial interests which conflict substantially "or appear to conflict substantially" with one's official duties. 5 C.F.R. § 735.204(a). The OPM regulations require each agency head to in turn issue standards of conduct regulations for agency employees which implement the requirements and standards of the OPM regulations and the Executive Order. 5 C.F.R. § 735.104. The conduct standard in question, therefore, will appear in the standard of conduct regulations of each executive branch and independent agency of the federal government, as well as in the OPM regulations and Executive Order No. 11222.

It appears that the standard of conduct in question, that is, "appearance" of improprieties, conflicts of interest or use of one's office for personal gain, is one which is clearly used as a basis for disciplinary action by federal agencies in the federal service, including removal from service, and one which has been upheld as a basis for removal of employees by several federal court decisions.

As to removal from service, under federal statutory law even a federal employee with job protection in the competitive service may be removed or suspended from office "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a). See Office of Personnel Management regulations at 5 C.F.R. Part 752. As explained in the Federal Personnel Manual, published

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by the Office of Personnel Management, violations of conduct standards, including the "appearance of improprieties" standard, have been found by federal courts to have constituted just "cause" for removal. Federal Personnel Manual, Chapter 752, Part 3-2 "Merit of the Adverse Action", Paragraph (c).

The Merit Systems Protection Board (MSPB), to which agency adverse actions against employees may be appealed, has upheld the disciplining by an agency of federal employees on the basis that such employees' conduct created the "appearances" of certain improprieties. In the decision of Moffer v. Department of the Interior, 8 MSPB 134 (1981)^{2/}, the Board upheld an agency's disciplinary charge against an employee that such employee's actions "created the appearance of using his office for private gain." 8 MSPB at 135. The Board, in fact, found that the presiding officer had erred in not considering the "appearance" of impropriety standard as charged by the agency:

We find error in the presiding official's conclusion with respect to the agency's third charge relating to the appellant's alleged misuse of his office for private gain. In this respect, the appellant was charged with violating 43 C.F.R., Part 20, Section 735-32(d)(1), which provides, in pertinent part:

An employee must avoid action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:

1. Using public office for private gain; [Emphasis added.]

In reaching his decision on this charge, the presiding official discussed the evidence and concluded that the agency had failed to prove that the appellant had used his office for private gain. However, he erred in failing to consider or rule on whether the appellant, in knowingly engaging in a real estate transaction with the Indian seller, created the appearance of using his office for private gain. 5 C.F.R. § 1201.111(b)(1). The record clearly supports a finding that the appellant's participation in the transaction created the appearance of his use of his federal office for private gain. Such conduct was prohibited under the agency's regulations.

^{2/} See Moffer v. Watt, 690 F.2d 1037 (D.C. Cir. 1982).

Similarly, the MSPB upheld a disciplinary action against a federal employee even if the circumstances of the case "do not . . . compel us to a conclusion that appellant took money" or "in any way profited from these transactions" in question, since the circumstances "could be said to create the appearance of using public office for private gain." In Burnett v. U.S. Soldiers' and Airmen's Home, 11 MSPB 559 (1982), the Board explained:

Insofar as the presiding official's finding with respect to appellant's financial gain is concerned, we affirm that finding. There is no evidence in the record supporting appellant's financial gain. In both an interview with agency officials and in his later deposition, Mr. Bird said he always signed the checks and appellant always brought the money back to him. It has in no way been established in the record that Mr. Bird was not mentally alert or that he did not really know whether all of the money was returned.

* * *

In our view, the only violation of rule or regulation sustainable by the transactions on their face is the violation of the regulation found at 5 C.F.R. § 735.201a(a), which provides in pertinent part:

An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or *create the appearance of*: (a) using public office for private gain. (Emphasis added.)

Here we have a situation where appellant cashed checks for a member of the Home as a favor.

* * *

These circumstances do not, in our view, compel us to a conclusion that appellant took money from Mr. Bird. While, as the agency and the OPM point out, they are somewhat suspicious in nature, it is also clear that the alternative explanations are quite possible. Indeed, the evidence of record before us contains nothing to show that appellant took money or in any way actually profited from these transactions. Thus, it is not clear that the matter asserted (illegal gain) is more likely to be true than not true. See, n.5 *supra*.

Nonetheless, as set forth above, the circumstances of the transactions could be said to create the appearance of using public office for private gain. Therefore, we sustain the charge that the transactions occurred and that 5 C.F.R. § 735.201a(a) was violated.

* * *

11 MSPB at 561 - 562 (Emphasis added).

In Miller v. United States Postal Service, 7 MSPB 413 (1980), the MSPB found certain outside employment activity of a Postal Service employee to provide a basis for disciplinary action since the activity "resulted in, or created the appearance of, a conflict of interest in violation of" applicable regulations. 7 MSPB at 414, emphasis added.

Federal courts have upheld the removal of federal employees based on violations of conduct standards requiring the avoidance of activity which may create the "appearance" of certain improprieties. The courts have shown reluctance to overturn such agency disciplinary decisions, and have generally deferred to the agency's and the executive branch's discretion in such personnel matters, absent a showing of arbitrary or capricious conduct by the agency, as long as discharges for "cause" are supported by substantial evidence (5 U.S.C. § 7703(c)(3)). See, for example, McLiernan v. Gronouski 337 F.2d 31, 34 (2d Cir. 1964); McDowell v. Goldschmidt, 498 F. Supp. 598, 604 (D. Conn. 1980).

In the case of Lowery v. Richardson, 390 F. Supp. 356 (E.D. Okla 1973), the court, in finding that the agency charge against an employee that the employee's conduct created the "appearance of impropriety" was not impermissibly vague, quoted with approval from the decision of the former Civil Service Commission's Board of Appeals and Review:^{3/}

The agency charged Mr. Lowery with "conduct unbecoming a government representative": as the agency's representative at the hearing said, "with indiscretion and breach of a fiduciary position." It was these charges that the Region found appellant unable to refute because he had private dealings with a firm whose work he was in charge of reviewing. As the agency and the Region stated, it is the ap-

^{3/} This case was decided prior to the passage of the Civil Service Reform Act of 1978 which established the Merit System Protection Board.

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pearance of impropriety in such relations that more than anything else creates the cause of action. This appearance is why removal is for a cause that will promote the good of the service. If the agency were to allow one of its fiduciary agents to continue such conduct, it would lose its appearance of inviolability. It would seem to sanction such nonprofessional relations and its credibility would be damaged.

In this situation appellant was in a position of public trust, and any relations that cast even the appearance of impropriety on him might damage his effectiveness in the taxpayers' eyes.

390 F. Supp. at 359, emphasis added.

In Jones v. United States, 617 F.2d 233 (Ct. Claims 1980), the court upheld the removal of a Department of Agriculture employee for the acceptance of a gift of a single bottle of whiskey from the owner of a packing house over which the employee had official responsibility. Even though the allegations did not involve charges that the employee favored the packing house in any official decisions, the court found the removal justified based on agency regulations on acceptance of gifts and the general standard, as explained by the Civil Service Board of Review, that any action by an inspector "which creates even the appearance of a conflict of interest will result in a severe penalty." 617 F.2d at 237.

In addition to disciplinary actions, the United States Court of Claims also found that administrative law judges for the Department of Defense on the Armed Services Board of Contract Appeals were subject to agency conduct standards barring even the "appearance of impropriety" of DOD employees, and that such standards were substantive and actionable such that they justified vacating prior decisions by a judge in contravention of those standards. In Gulf & Western Industries, Inc. v. United States, 671 F.2d 1322 (Ct. Claims 1982), the court explained:

A cardinal principle of judicial conduct is that a judge must avoid not only actual impropriety but also the appearance of impropriety The comment to Canon 2 of the American Bar Association's Code of Judicial Conduct warns that "[a] judge must avoid all impropriety and appearance of impropriety." Similarly Canon 2 of the Code of Judicial Conduct for United States Judges, which the Judicial Conference of the United States has approved, states that "[a] judge should avoid impropriety and the appearance of impropriety in all his activities." Although technically these standards may not cover administrative judges who are members of the Armed Services Board of Contract Appeals, the sensitive nature and public importance of the adjudicatory duties those individuals perform require that the same principles should govern their conduct The standards of conduct for employees of the Department of Defense instruct Departmental employees to "avoid any action . . . which might result in or reasonably be expected to create the appearance of . . . (d) [l]osing complete independence or impartiality . . . or (f) [a]ffecting adversely the confidence of the public in the integrity of the government." 32 C.F.R. § 40.-6 (1980).

Judge Grossbaum's actions in this case created at least an appearance of impropriety.

* * *

The appearance of impropriety that these activities created tainted the Board proceedings and requires that the Board decision be vacated.

671 F.2d at 1325 - 1326.

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The United States Court of Appeals for the First Circuit in 1981 affirmed a lower court ruling which allowed the United States Government to move to recover profits made by an employee of the Federal Housing Authority in outside real estate ventures with his wife and son which were found to create an "apparent" conflict of interest with the employee's official activities. In the case of United States v. Kenealy, 646 F.2d 699 (1st Cir. 1981), the court explained that even though the lower court did not conclusively show that the employee had profited because of his governmental position, agency regulations which barred actions which "appear" to conflict with official duties, were substantive standards in themselves which created a fiduciary relationship to the government and the public upon which the recovery of private outside profits could be based:

These regulations by their terms proscribe apparent as well as actual conflicts of interest.⁶ They are "thus directed not only at dishonor, but also at conduct that tempts dishonor." *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549, 81 S.Ct. 294, 308, 5 L.Ed.2d 268 (1961). Under these regulations, factual questions about the extent of Joseph's actual involvement in each particular transaction are not material so long as it is clear, as it is here, that the record establishes an apparent conflict of interest between Joseph's official duties and his outside activities.⁷ Joseph thus is liable under this theory unless he has erected a successful defense—the matter to which we next turn.

646 F.2d at 704, emphasis added.

The courts have therefore upheld removals, discipline, and other actions based on general conduct standards, including those prohibiting actions which give rise to the "appearance" of certain improprieties, when initiated by agencies of the federal government. See also Wild v. United States Department of Housing and Urban Development, 692 F.2d 1129, 1131 (7th Cir. 1982), reh'ring and reh'ring banc den., Jan. 26, 1983; Camero v. United States, 345 F.2d 798 (Ct. Claims 1965); Womer v. Hampton, 496 F.2d 99 (5th Cir. 1975); note also United States v. Miller, 624 F.2d 1198, 1202 - 1203 (3rd Cir. 1980) where former Justice Department employee was disqualified from representing a private party on a matter even though the representation would not violate the express provisions of the so-called "revolving door" statute (18 U.S.C. § 207), but because such activity could legitimately raise "the appearance of professional impropriety".

Although the courts have not found the "appearance" of impropriety or conflict of interest standard vague when relating to discipline of employees for such things as outside employment activities, financial holdings, or receipt of gifts or other things of value, there may be called into issue the vagueness of this standard if it is attempted to be applied to speech or conduct by employees involving First Amendment protections. Concerning the general standard for removal of federal employees in the competitive service, that is, for "such cause as will promote the efficiency of the service", the Supreme Court, in upholding that general standard against the charges of vagueness found in the majority opinion of Justice Rehnquist that since Congress enacted the standard "with the intention of conferring job protection rights on federal employees which they had not previously had, it obviously did not intend to

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authorize discharge under the Act's removal standard for speech which is constitutionally protected." Arnett v. Kennedy 416 U.S. 134, 162 (1974). Therefore, in cases involving First Amendment speech and conduct, as opposed to economic, monetary, or financial matters, there may be required a greater specificity and precision in a regulatory context. Note United States v. Robel, 289 U.S. 265 (1967); Aptheker v. Secretary of State, 378 U.S. 500, 512-513 (1964); United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 548 (1972); note Keefee v. Library of Congress, 588 F. Supp. 778, 789-790 (D.D.C. 1984), appeal docketed, No. 84-5464 (D.C. Cir. July 25, 1984).

It should be noted that certain legal actions initiated by private parties, rather than federal agencies, which have attempted to overturn or require certain agency action based on private allegations of "appearance" of improprieties of federal officials, have not been sustained by the courts. In the case of CACI, Inc. - Federal v. United States, 719 F.2d 1567 (Fed. Cir. 1983), the court would not set aside a contract on the complaint of an unsuccessful bidder who claimed that the award was tainted by an appearance of an impropriety when the "possibility and appearance of impropriety is not supported on the record" and is based merely "on suspicion and innuendo, not on hard facts". 719 F.2d at 1581-1582. The court noted that the conduct standards cited were merely "general standards to guide government employees in the performance of their duties" and do not create "specific and precise standards, the violation of which would justify enjoining the Department from awarding a contract."^{4/}

^{4/} Concerning federal contracts, a contract or agreement may be voided or rescinded when there has been a conviction for a statutory violation of certain criminal laws when related to that contract or agreement. 18 U.S.C. § 218.

(cont'd)

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719 F.2d at 1581. (See also Grassetti v. Weinberger, 408 F. Supp. 142 (N.D. Cal.) as to charge of conflict of interest by private party who is unsuccessful bidder on contract or grant.) Additionally, in Center for Auto Safety v. F.T.C., 586 F. Supp. 1254 (D.D.C. 1984), the court found that an alleged "appearance" of a conflict of interest, charged again not by the agency within its discretion over personnel matters but by a private outside party, would not require the court, absent any evidence of abuse of discretion by the agency or the official involved, to overturn the agency decision to allow the employee to work on a particular governmental matter.

The discretion of an agency in personnel matters concerning discipline, removal or disqualification of employees because of potential "appearance" of improprieties is thus apparently given substantial weight. In Wathen v. United States, 527 F.2d 1191 (Ct. Claims 1975), reh'ring den. January 30, 1976, the court upheld the discharge of an IRS employee for being charged with suspicion of murder for which he was later acquitted for reasons of insanity. The court noted that IRS has an interest to maintain a good public image and that "any scandal involving an IRS employee impaired the integrity of the office . . . In its discretion that agency is entitled to act with promptness in maintaining the efficiency of the service by such disciplinary actions as

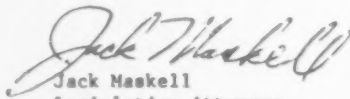
4/ (cont'd)

Those provisions include the federal bribery laws, the laws regarding self dealings by federal employees and acts affecting a personal financial interest (18 U.S.C. §§ 201, 203, 205, and 208), among others. The "appearance" of impropriety standards are not criminal provisions and thus although they may be and have been used to sustain personnel actions, they do not come within this particular statutory provision regarding rescission of contracts because of conflicts of interest.

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will maintain public confidence." 527 F.2d at 1200-1201. The court ruled that the removal was "based upon substantial evidence and was neither arbitrary nor capricious" Id. As to the "appropriate penalty to impose upon an employee for infraction of an agency's rules", the court found that such decision is "within the discretion of the agency . . . subject to judicial review on a more limited basis for procedural regularity and abuse of administrative discretion and bad faith." Id. at 1203.

More recently, in Wild v. HUD, supra, the 7th Circuit Court of Appeals upheld the disciplining of an employee for the violation of the agency code for "conduct that is not necessarily forbidden by any express regulations" when the employee conducts "himself in a way likely to bring public obloquy upon HUD." 692 F.2d at 1131. The court noted that the question of the substantiality of the evidence was not in issue, and deferred to the agency finding that the conduct "impaired the efficiency of the agency by undermining public confidence in it . . .", without requiring the agency to actually prove in litigation that the conduct measurably impaired the mission of the agency. Id. at 1133. The court noted that the conduct involved, the ownership of rundown and slum housing by an employee of HUD, was obviously "inconsistent with the mission of the employer" Id., but remanded the case back to HUD to determine if the agency, in its discretion, wanted to remove the offending employee from office or provide a lesser discipline based on the general "appearances" violation in the code of conduct after more specific charges were dropped.


Jack Maskell
Legislative Attorney
American Law Division
March 29, 1985

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United States Senate

COMMITTEE ON
 GOVERNMENTAL AFFAIRS
 WASHINGTON, D.C. 20510

January 28, 1985

David Martin
 Director
 Office of Government Ethics
 1717 H Street, N.W.
 Room 436
 Washington, D.C.

Dear Mr. Martin:

As you know, I serve as the Ranking Minority Member of the Governmental Affairs Subcommittee on Oversight of Government Management, which has jurisdiction over the Office of Government Ethics. I have read the account in today's Wall Street Journal concerning your role in reviewing the ethical conduct of Edwin Meese as part of his nomination process for Attorney General. That article raises several questions which I would like you to answer by the close of business tomorrow.

1) a) Was the review of the Stein Report by OGE staff attorneys undertaken at your direction or was it initiated by the staff? Please provide the names of the staff persons who authored or are responsible for the report.

b) Was the review conducted relative to certification of Mr. Meese's nomination for Attorney General? If so, why was no reference made to it in the letter of certification to the Senate Judiciary Committee? If it was done for another purpose, please explain.

c) When did the review begin; when was it finished; when did you become aware that it was being conducted?

2) a) Please list all contacts you or OGE had with White House Counsel Fred Fielding, Mr. Meese, and Mr. Meese's attorney, Leonard Garment, about the OGE report. Was each contact in person, over the phone, or by letter? What was the date of each contact? Who was present? Who initiated each contact? Were any other OGE employees present other than yourself?

b) If there was any written summary of those meetings or correspondence related to those exchanges, please enclose them with your answers.

c) Did you share a copy of the OGE report with either Mr. Fielding, Mr. Meese or Mr. Garment?

3) a) Briefly describe the customary practice of your office in pursuing an allegation of a conflict of interest involving a

current federal employee. Does your office discuss such allegations with the Designated Agency Ethics Officer (DAEO), and if so, at what point?

b) Do you usually share a copy of a staff report or a draft thereof with the DAEO or the subject employee?

c) Is the employee then invited to explain his conduct?

d) How is disciplinary or corrective action determined and by whom? How many instances of disciplinary or corrective action have there been in the past three years?

e) The article states that upon "reviewing all the facts and meeting with Mr. Meese's lawyers" you decided not to seek corrective action. Please list those factors that affected your decision on this matter.

f) Please cite those cases where on previous occasions your staff has made findings of violations of ethics laws or regulations and you did not adopt them.

4) a) You certified to the Judiciary Committee on 1/24/85 that Mr. Meese was not in violation of any conflict of interest laws, yet you did not disclose at that time the OGE report or the developments that had occurred as a result of the meetings or conversations with Mr. Fielding and Mr. Garment. What was the basis for your decision to not inform, even on a confidential basis, the Judiciary Committee of the OGE report and subsequent actions?

b) Did you have any conversations or written exchanges with Mr. Fielding, Mr. Meese or Mr. Garment about keeping the report confidential? If so, when were those discussions or exchanges, who initiated such discussions or exchanges, who was involved in them, and what was requested of whom? Please provide a summary of any such conversations and any documents pertaining to this issue.

5) a) According to the Wall Street Journal, the OGE report identified two incidents in which violations of ethics laws or regulations may have occurred, namely Mr. Meese's involvement in the approval of John McKean to serve on the Postal Board of Governors and in the approval of Thomas Barrack to serve in the Department of Interior and later, the Department of Commerce. The article states that you were "satisfied" with Mr. Meese's conduct relative to Mr. McKean, because his participation had been "minor" and "(t)here was no basis for concluding, then, that he (Mr. Meese) had lost his impartiality in terms of supporting

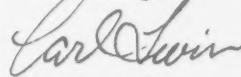
the guy (for the postal board)". Please explain in full your reasoning behind those conclusions.

b) The article further states that you "quickly ruled out any 'appearance' problem on the Barrack matter", because the Stein Report found no evidence showing Mr. Meese knew of "Mr. Barrack's help on the home sale at the time Mr. Barrack got the appointment". However, the Stein Report is very clear that Mr. Meese did know through direct conversation and correspondence that Mr. Barrack had agreed to work to sell Mr. Meese's home in a capacity similar to that of a broker, and that Mr. Barrack was not charging Mr. Meese any brokerage fee or finder's fee. This information was known to Mr. Meese before his approval of Mr. Barrack's appointments. In fact, at a dinner in November, before the approval of the appointments, Mrs. Meese is quoted in the Stein Report as saying, "Oh, we'll recognize him (Mr. Barrack). He'll be the one with the halo around his head, ". This was said in reference, according to the Stein Report, to "his efforts in helping the Meeses sell their house. (Stein Report, page 218.) If you have information that differs from this, or a different interpretation of these events, please provide them.

6) Please provide me with a copy of the OGE report referred to in the article and any correspondence, memos or documents concerning that report in the OGE or your personal files.

If you have any questions about this request, please contact Linda Gustitus of my staff at 224-3682. Thank you for your cooperation.

Sincerely,


Carl Levin

cc: Senator Strom Thurmond
Senator Joe Biden

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

FEB - 7

Honorable Carl Levin
Subcommittee on Oversight
of Government Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Levin:

This is in response to your letter of January 28, 1985, requesting that I answer certain questions raised by an article in that day's Wall Street Journal. The article related to an Office of Government Ethics staff review of the Independent Counsel's report concerning Edwin Meese III.

As you know, on January 31, 1985, I appeared before the Senate Judiciary Committee for five and one-half hours regarding this matter. While most of your questions were addressed and answered during that testimony, I understand your need to carry out the responsibilities of the subcommittee. Consequently, I am most happy to provide answers to your questions.

With regards to your questions in the referenced particulars:

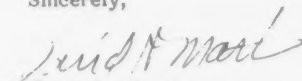
- 1(a). The review of the Independent Counsel's report was undertaken at my sole direction, and was prepared by two staff attorneys, F. Gary Davis and Nancy Feathers.
- 1(b). The review was undertaken so that I might fully carry out my duties as Director of the Office of Government Ethics, but not specifically with the certification process in mind. Had any matter been raised which I thought proper to reference in the letter of certification, I would have done so. Since the final conclusions of this Office were matters properly within the executive branch, I considered it proper to be handled within the executive branch.
- 1(c). The review began in mid-December and finished on or about the 14th of January. I was aware that it was being conducted when I directed that it be undertaken.
- 2(a). I contacted Fred Fielding by telephone regarding this matter on January 16, 1985. When advised of the review, Mr. Fielding inquired if I would meet with Mr. Meese's attorneys. Consequently, on January 17, Messrs. Garment, Peter Morgan and Bob Wallach came to my Office, where Mr. Donald Campbell, our Chief Counsel, and I advised them of the results of the review. The next day, January 18, Messrs. Garment, Wallach and Morgan met with me and Mr. Campbell in my Office, and presented a draft memorandum. On January 22, a messenger delivered Mr. Garment's final memorandum, which I requested Mr. Davis and Ms. Feathers to review.

- 2(b). The only correspondence was the memorandum from Mr. Garment, which I have enclosed. The meetings were quite brief and there were no written summaries.
- 2(c). No.
- 3(a). It is customary to bring the Designated Agency Ethics Official into the discussion at the earliest possible point. However, in most cases, the information flow is opposite to what occurred in this matter. Normally, it is the Designated Agency Ethics Official who develops the information, and upon whom we rely to gather the facts.
- 3(b). See answer to 3(a).
- 3(c). Normally, the employee is aware of the investigation or the review, and is most anxious to explain or describe their position. We routinely hear from an employee or their attorney.
- 3(d). Pursuant to the Code of Federal Regulations, disciplinary action can only be undertaken by the head of an agency. Corrective action in the context of the Ethics in Government Act (the Act) generally relates to institutional changes in agency procedures or policy. However, section 402a of the Act directs that I consult with agency ethics counselors regarding the resolutions of conflict of interest problems in individual cases. After meeting with my staff, we decided that the only action required by this Office was to notify Mr. Fielding of the appearance problem. Your inquiry asked how many corrective actions there have been in the past three years. We have, through many of the tools available to us in the Act, taken corrective action to resolve many conflict of interest problems, and do not, as a matter of practice, include them in the certification letter. As you know, my view of the Act's thrust relates to preventing conflicts of interest in the executive branch.
- 3(e). The final conclusion of this Office was that based upon the facts of the McKean loan arrangement, an appearance problem was created. I already knew that Mr. Meese was aware of the appearance problem, and of the regulations which caution against creating appearance problems, having pointed this out to Messrs. Wallach, Garment and Morgan. We believed that it was unnecessary to do anything further, other than to advise Fred Fielding, the Designated Agency Ethics Official.
- 3(f). The underlying premise of this question is inaccurate. In this matter, after several meetings with and much discussion among Mr. Campbell, Mr. Davis, Ms. Feathers and myself, we reached a conclusion in which we all concurred. In general, there have been occasions when members of my staff have disagreed on the appropriate resolution of ethics-related questions.
- 4(a). I did not think that it was proper for me to raise it with the Senate Judiciary Committee.
- 4(b). No.
- 5(a). My conclusions were based on the following facts:
- at the time the loans were made, there was no evidence that Mr. McKean was interested in, or even contemplated receiving, a federal position;

- both loans were arms-length transactions at higher than prevailing bank rate interest;
 - consideration of Mr. McKean's name was initiated by Mr. Deaver;
 - Mr. Deaver initiated the nomination of Mr. McKean for a longer term on the Board, at which time the appointment process was already in motion;
 - the Independent Counsel's report found no evidence that Mr. Meese spoke to anyone or took any action to assist Mr. McKean in obtaining a longer term; and
 - the appointment of Mr. McKean for a full term was already in progress through the Office of Presidential Personnel before the executive committee met.
- 5(b). Unfortunately, the article in the Wall Street Journal was inaccurate in this regard. As only part of my explanation, I stated that Mr. Meese had no knowledge of the financial involvement of Mr. Barrack in the sale of the house. The factors that influenced my decision regarding the Barrack appointment are as follows:
- (1) The position at the Department of Commerce had been offered to Mr. Barrack by Secretary Malcolm Baldrige, and he had already accepted the position before the executive committee met;
 - (2) because Mr. Barrack thought the Meese home was a good buy, his efforts were extended toward helping his friends rather than exclusively the Meeses;
 - (3) Mr. Barrack disclosed to no one that he had been involved in the sale of the Meese house; and
 - (4) Mr. Meese took no action to secure the appointment for Mr. Barrack. Rather he merely attended a meeting of the executive committee after both the offer and acceptance of the position had been made.
6. Enclosed please find a copy of the review made by Mr. Davis and Ms. Feathers, a letter to Senator Biden, a letter to Senator Thurmond, and a letter to Senators Thurmond and Biden.

If you have any further questions regarding this matter, please do not hesitate to contact me.

Sincerely,


David H. Martin
Director

Enclosures

WILLIAM V. ROTH, JR., CHAIRMAN
 CHARLES H. PERCY, RI.
 TED STEVENS, ALABAMA
 CHARLES RICH MATTHEWS, JR., MD.
 WILLIAM S. COHEN, RHODE ISLAND
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 DANIEL J. SYRUS, MISSOURI
 JUDITH M. BROWN, STAFF DIRECTOR AND CHIEF COUNSEL
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 CARL LEVIN, MICHIGAN
 JEFF BINGHAM, N. MEX.

United States Senate

COMMITTEE ON
 GOVERNMENTAL AFFAIRS
 SUBCOMMITTEE ON
 OVERSIGHT OF GOVERNMENT MANAGEMENT
 WASHINGTON, D.C. 20510

SUBCOMMITTEE
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 CARL LEVIN, MICHIGAN
 JEFF BINGHAM, N. MEX.
 SUSAN M. COLLINS, STAFF DIRECTOR

February 11, 1985

David Martin
 Director
 Office of Government Ethics
 1717 H Street, N.W.
 Room 436
 Washington, D.C.

Dear Mr. Martin:

Thank you for your answer to my letter of January 28, 1985. However, your response as well as your testimony before the Senate Judiciary Committee has triggered in my mind questions which I request that you answer by close of business Wednesday, February 13, 1985.

To clarify for me your conduct in the review of the Stein Report by the Office of Government Ethics (OGE) and your interpretation of Executive Order 11222 and the regulations issued pursuant thereto, please answer the following questions.

1) You stated that the OGE was finished on January 14, 1985; that you telephoned Fred Fielding on January 16, 1985; that you met with Edwin Meese's attorneys on January 17 and 18, 1985; and that Leonard Garment sent you his final memo on January 22, 1985. Were the meetings you had with your staff, referred to in your answer 3(f), where you "reached a conclusion in which (you) all concurred" held before the Fielding phone call and the meetings with Mr. Meese's attorneys, intermittent to that, or after that? Please state specifically just when you arrived at the conclusions with your staff relative to your conversations with Mr. Fielding and Mr. Meese's attorneys.

2) In your answer 3(e) you say you knew Mr. Meese was aware of the appearance problem, because you had met with his attorneys, and you didn't do anything further, except to advise Mr. Fielding. Did you call or meet with Mr. Fielding after receipt of the final Garment memo? If so, what was said at that time?

3) Please provide me with a copy of the draft memo submitted by Mr. Garment to the OGE.

-2-

4) To what extent did the Garment memo affect your decision? If it did in any way, please cite those parts of the memo that influenced you.

5) At the Judiciary Committee hearing you repeatedly said the regulations implementing Executive Order 11222 were "aspirational". Upon what do you base that opinion? When was the first time you used the word "aspirational" in characterizing your interpretation of the conflict of interest regulations? If such use is contained in an OGE document, please enclose a copy of any such document.

6) The regulations concerning conflict of interest speak to "appearance" and "actual result" in the same section, using the words, "an employee shall avoid any action ..." with respect to both matters. Yet, you seem to treat the two aspects of the problem differently. At the Judiciary Committee hearing you said (and this is almost an exact quotation), "If there's nothing to the appearance (that is, behind the appearance) then I don't know how you can say there's a violation." Is it your professional opinion that creating an appearance of a conflict of interest does not violate the regulations? What is your basis or support for that interpretation?

7) In the letter to Senator Thurmond of January 28, 1985, you said, "only one of the allegations rose to the level of a violation of the standards of conduct". In a letter to Senator Biden on that same day you did not mention this conclusion. And in a letter to both Senators Thurmond and Biden on January 29, 1985, you said there was an appearance problem. Is there a difference in your mind between a violation of the standards of conduct and an appearance problem? If so, what is the difference and which is accurate with regard to OGE's review of the Meese matters?

8) I asked you in my earlier letter, for the number of corrective actions taken by your office, and you answered that you've taken corrective actions to resolve many conflict of interest problems. Does your office or do the DAEO's keep records of violations? If so, does that include issues of appearance? Please provide any available statistics for the past three years. Does your office or do the DAEO's keep records of corrective actions taken or sought in response to violations? If so, please provide those statistics for the past three years. If not, please provide your best estimate of the number of such corrective actions taken with the past three years.

-3-

9) You stated in your answer 4(a) to me that you didn't think it was "proper" to raise your staff's findings on Mr. Meese or your conclusions or contacts with the White House or Mr. Meese's attorneys with the Judiciary Committee, and in the letter to Senators Thurmond and Biden of January 29, 1985, you said, "I did not advise you of the staff working paper and of my determinations, since I found that Mr. Meese's objectivity had not been impaired in the McKean matter." Yet, in your answer to questions by our Subcommittee during consideration of your nomination, you said, "In certain cases when the nature of an allegation requires that it be aired, and a decision made by the Office of Government Ethics either clearing an official of any conflict-of-interest or stating that there clearly is a conflict-of-interest, the Office's findings should be made public." (May 12, 1983) The Governmental Affairs Committee Report on the reauthorization of the OGE in 1983 on the subject of issuing public statements said, "The Committee strongly believes that the OGE should retain discretion over when to issue public statements. The ability to issue a public report is an important enforcement tool that can be particularly valuable in highly visible cases. Such public statements not only resolve the controversy surrounding such cases, but also increase public confidence in and awareness of the ethics program by indicating that an independent entity has reviewed the matter for ethical violations." (Page 18) What would have been improper about having raised this matter with the Judiciary Committee? Be specific.

10) Relative to your construction of the facts in the McKean and Barrack instances --

a) You answered in your letter to me that your conclusion regarding Mr. McKean was based on, inter alia, the fact that "at the time the loans were made, there was no evidence that Mr. McKean was interested in, or even contemplated receiving, a federal position." At the time the \$20,000 loan was made, McKean's nomination had been approved by the Personnel Committee and the President was awaiting Senate confirmation. How, then, can you justify your above statement as a "fact"?

b) You say in your answer 5(b) that "because Mr. Barrack thought the Meese home was a good buy, his efforts were extended toward helping his friends rather than exclusively the Meeses." Would Mr. Barrack's interest in helping Mr. Meese have to have been "exclusive" for purposes of assessing any violation of the standards of conduct? And, upon what do you base your finding that Mr. Barrack was helping Mr. Meese in order to "help his friends"? Did you interview Mr. Barrack? Did you do any investigation or research beyond the Stein Report?

-4-

c) Given the fact that Mr. Meese had been unable to sell his home for some 20 months and Mr. Barrack sold his home within two weeks of being asked for help, and given the fact that Mr. Barrack sold Mr. Meese's house without a commission, and given the facts I cited on this subject in my earlier letter, is it your opinion that Mr. Barrack did not provide something of value to Mr. Meese outside of the \$83,000 loss he later took on the transaction? Is your finding that there was no ethical violation involving an appearance of a conflict of interest, here, based more on your opinion that Mr. Barrack did little or nothing of value for Mr. Meese or upon your opinion that Mr. Barrack's job was already decided upon without the approval of the Personnel Committee? What is the most significant factor in your decision that the Barrack matter did not create an appearance problem like the McKean matter?

d) Is your conclusion in your answer 5(b)(4) that Mr. Meese merely attended the Personnel Committee meeting "after both the offer and acceptance of the position had been made" supported by the Stein Report? If so, where?

Again, I request that you answer these questions by the close of business Wednesday, February 13th. If you have any questions concerning the letter, please contact Linda Gustitus of my staff at 224-3682.

Sincerely,



Carl Levin

CL:ljg

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

FEB 20

Honorable Carl Levin
Subcommittee on Oversight
of Government Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Levin:

This is in response to your letter of February 11, 1985, requesting that I answer certain other follow-up questions pertaining to Mr. Edwin Meese III's nomination to be Attorney General which arose both from my responses to previous questions and from my testimony before the Senate Judiciary Committee.

With regards to your questions in the referenced particulars:

1. I twice spoke with White House Designated Agency Ethics Official (DAEO), Fred Fielding. The first conversation, on January 16th, was to inform him as the DAEO of the tentative conclusions reached by the staff report -- basically that the Barrack and McKean matters presented possible appearance problems. The gift problem aspect of the report had been dismissed during OGE meetings and discussions preceding this initial phone call. Subsequent meetings and discussions produced a conclusion on the Barrack matter before the meeting with Mr. Meese's attorneys on January 17. The second phone call to Fred Fielding was placed after the 22nd to advise him that the McKean matter still presented an appearance problem.
2. Yes, as I stated above, I telephoned Mr. Fielding a second time, after receipt of Mr. Garment's memo, to advise him that the McKean matter still presented an appearance problem. I advised him that I left to his discretion as DAEO what action, if any, would be taken.
3. I do not have a copy of the draft memorandum. When we met with Mr. Meese's lawyers, we reviewed their draft memorandum, but were never given a copy. My best recollection is that what we reviewed at the meeting with Mr. Meese's lawyers was substantially the same as what we ultimately received.
4. Mr. Garment's memorandum did not influence my decision, or the conclusion of our staff attorneys.
5. Upon assuming the position of Director of the Office of Government Ethics, I was confronted with a series of issues which required a close study of Executive Order 11222 and its implementing regulations. I concluded that the Executive Order contained language which merged both disciplinary and aspirational principles. Certain provisions of the Executive Order, such as section 201(c), do not readily lend themselves to clear criteria for specific disciplinary actions. Others, however, such as section 201(a), are more defined in nature and provide a clearer basis for agency

action. Developing case law in the area seems to support this conclusion. For example, in CACI, Inc. v. United States, appeal no. 83-742 (Fed. Cir., Oct. 28, 1983), the court held that a Claims Court opinion that there was both the opportunity for and appearance of impropriety in a contracting process was not an adequate or proper basis for enjoining the award of a contract. The Court went on to say that 5 C.F.R. §735.201a (1982) merely provides general standards to guide employees in the performance of their duties. It does not create specific and precise standards, the violation of which would justify enjoining a Department from awarding a contract.

Notwithstanding the court's findings and the confusion generated as to the appropriate criteria to apply for determining Executive Order violations, we have, based on longstanding policy, attempted to apply objective standards in each instance where we are called upon to make a determination on an appearance issue; we do this by looking behind the appearance to determine if there is any reality to the appearance.

I have referred to this marriage of disciplinary and aspirational principles within the Executive Order and its provisions for nearly as long as I have been the Director of this Office.

6. In both my opening statement to the Judiciary Committee and in later exchanges with individual members of the Committee I made it clear that as regards an appearance of impropriety, we express the issue in terms of an "appearance problem". Thus, standard office procedure has always been that once an appearance problem surfaces, we seek to determine whether there is any "substance to the appearance". If there is no substance to the appearance, in my view, there is not a violation of the standards of conduct.

7. Yes, subjective appearance problems are frequent throughout the federal work force. Without some exploration of the facts surrounding an appearance problem and a corresponding effort to establish an objective basis for action the federal government would not be able to function. If, upon examination of an appearance problem, we are left only with the appearance, then we must decide what, if any, action may be necessary to deal with the appearance. That is quite different from a clear, substantial and objective violation.

8. This Office reviews approximately 1,100 public financial disclosure statements (SF 278s) per year. This includes new entrants, incumbents, and departures from government service.

Calendar year 1981 is the last year for which we have compiled specific data with regards to corrective action directed by OGE. In that year, 615 new entrant reports were reviewed. Of those, 354 required at least one corrective action, which included resignation, recusal, divestiture, establishment of a blind trust, waiver, leave of absence, and others. We have not kept records or any studies of appearance problems.

9. I did not feel that the existence or substance of the OGE staff working paper was properly a "public" document. I do continue to feel that the OGE can and should make public statements in individual cases when necessary to explain its position or decision. However, as the Senate Governmental Affairs Committee Report on the subject said, "... OGE should retain discretion over when to issue public

statements." Furthermore, a public statement should be of a descriptive and expository nature on the Office's position or decision, and should explain the reasons behind the results. Under no circumstances would a public statement be the release of individual staff's thoughts on a matter which amounted to being only one factor in the Office's decision-making process. Once I had dealt with the appearance problem involved in the McKean loan arrangement properly within the executive branch, I did not feel it was proper to raise it before the Committee. For instance, had I directed the analysis to be made back in November and had the results been the same and handled within the executive branch, I would not then have raised the matter in the certification letter of January 24.

10.(a) I will clarify that answer as follows: at the time of the original \$40,000, there was no evidence that Mr. McKean was interested in or even contemplated receiving a federal appointment.

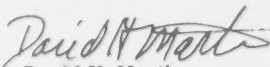
10.(b) No, only one factor. You have misconstrued my answer in regard to Mr. Barrack's motive. His motives, based on the Stein report, are that he thought the purchase was a good deal, that he wanted to assist his friend Elkins in a business fashion, and that he often invited his friend Howard into good business deals. His primary motive was to help his friends by bringing them into a good business venture.

10.(c) In my opinion, there was an insufficient causal connection between Mr. Barrack's actions and his appointment to a federal job. Prior personal dealings do not forever bar other involvement. Mr. Barrack was recruited for a federal position at Interior. He apparently did well there because he was supported for promotion from this agency to a higher position at the Department of Commerce. Over seven months had lapsed since Mr. Barrack was involved in the sale of the Meese home and the Executive Committee meeting; and the position at Commerce had been offered and accepted before the Executive Committee met. Mr. Meese took no action at the Executive Committee meeting.

I based my conclusions in the Barrack matter on all the facts and circumstances.

10.(d) Yes, at p. 221.

Sincerely,


David H. Martin
Director

United States of America
**Office of
Government Ethics**

Office of Personnel Management
Washington, D.C. 20415

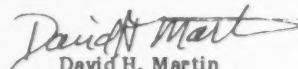
APR 30 1985

Honorable William S. Cohen
Chairman, Subcommittee on Oversight
of Government Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In view of the concerns expressed by your Subcommittee during the oversight hearings on the Office of Government Ethics on Wednesday, April 24th, with a perceived dual standard involving the interpretation and enforcement of the appearance of impropriety proscriptions set forth in E.O. 11222, I have issued the enclosed memorandum in an attempt to alleviate any confusion on this issue.

Sincerely,


David H. Martin
Director

Enclosure

cc: Senator Levin

United States Government
MEMORANDUM

**Office of
Government Ethics**

APR 30 1995

Subject: Interpretation of Standards of Ethical Conduct for Government Officers and Employees, Executive Order No. 11222 — Appearance of Impropriety

From: David H. Martin *David H. Martin*
Director

To: Heads of Departments, Independent Agencies, Commissions and Government Corporations, Designated Agency Ethics Officials

In my recent testimony before a Senate oversight committee regarding the appearance of impropriety issue, I stated it was my intention, based on my personal views of the subject, to consider proposing amendments to Executive Order No. 11222. In order to avoid confusion regarding the appearance of impropriety proscriptions set forth in Executive Order No. 11222, as well as in the government-wide implementing regulations, 5 C.F.R. Part 735, you are advised to implement the Executive Order and the regulations consistent with your past interpretations. The standards set forth in the Order have not been changed.

I also wish to emphasize that your agency regulations implementing the Executive Order are to be uniformly applied to every officer and employee of your agency.

WILLIAM V. ROTH, JR., DELAWARE, CHAIRMAN
 TED STEVENS, ALASKA
 CHARLES W. MATTHEWS, JR., MARYLAND
 WILLIAM S. COHEN, MAINE
 DAVID DURENBERGER, MINNESOTA
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 LAWTON CHILES, FLORIDA
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 JOHN M. DUNCAN, STAFF DIRECTOR
 MARGARET P. CRENSHAW, MINORITY STAFF DIRECTOR

SUBCOMMITTEE
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 LAWTON CHILES, FLORIDA
 SUSAN M. COLLINS, STAFF DIRECTOR

United States Senate
 COMMITTEE ON
 GOVERNMENTAL AFFAIRS
 SUBCOMMITTEE ON
 OVERSIGHT OF GOVERNMENT MANAGEMENT
 WASHINGTON, DC 20510

May 16, 1985

The Honorable David H. Martin
 Director
 Office of Government Ethics
 1717 H Street, N.W.
 Room 436
 Washington, D.C.

Dear Mr. Martin:

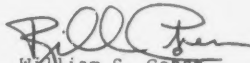
As you know, one of the major issues of concern to the Subcommittee on Oversight of Government Management during its April 24, 1985, hearing on the Office of Government Ethics was your application of the standards of ethical conduct regulations in cases involving the appearance of a conflict of interest. In response to questioning, you stated that "I think you'll find in all of my opinion letters that I don't call any of these appearance instances a violation. I call them maybe an intolerable appearance problem or an unacceptable appearance."

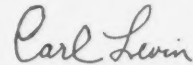
In order to provide the Subcommittee with further information on this issue, we ask that you provide us with the following information:

- a) all advisory opinions, letters, or other rulings issued since you became the Director of the OGE in which you or your office concluded that an action creating the appearance of a conflict of interest is not a violation of the standards of ethical conduct regulations under Executive Order 11222, and
- b) at least six advisory opinions, letters, or rulings issued since you became Director of the OGE in which you or the OGE applied the appearance provisions of the standards of conduct regulations or the Executive Order 11222 to a federal employee.

I ask that you provide the Subcommittee with this information no later than Tuesday, May 28. If you have any questions, please contact Linda Gustitus or Mary Gerwin of the Subcommittee staff at 224-5538.

Sincerely,


 William S. Cohen
 Chairman


 Carl Levin
 Ranking Minority Member

WSC:CL:mbg

UNITED STATES OF AMERICA
OFFICE OF GOVERNMENT ETHICS
OFFICE OF PERSONNEL MANAGEMENT

Office of the Director

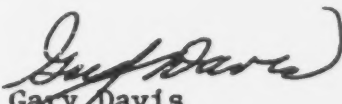
5/16/85

Subcommittee on Oversight
of Government Management
Committee on Governmental Affairs
Room 326
Dirksen Office Building
United States Senate
Washington, D.C. 20510

Attn: Susan Collins
and Linda Gustitus

As a follow-up to your May 16th, telephone request, please find enclosed copies of several informal advisory opinions rendered by the Office of Government Ethics on the issue of appearance of impropriety.

Sincerely,


Gary Davis
Staff Attorney

Enclosures

United States of America
**Office of
Government Ethics**

Office of Personnel Management
Washington, D.C. 20415

85 x 2

Letter to an Employee dated 1/7/85

This responds to your letter of December 11, 1984 requesting this Office's opinion on several issues arising from the off-duty activities of two Inspector General agents.

Your submission relates that the matter arises from a successful criminal racketeering prosecution in [a specific city] which received widespread media publicity. Thereafter, the Inspector General's Office (I.G.'s Office) was approached by [a magazine] which was interested in writing a feature story on the case. The I.G. Office asked two agents who were involved in the investigation to cooperate. Without prior approval of the Department, the two agents entered into contracts giving [the magazine] in exchange for monetary payments, production rights to the agents' "Story": the "life story [of each agent], including all portions thereof pertaining to [their] ... investigation of racketeering [in a specific section of the city] ."

Further, you advised that after the Department of Justice declined criminal prosecution, your office began its own internal investigation which resulted in a directive to the agents to return the money received and to divest their interests by rescinding the contract.

First, you ask whether the agents have any private rights (e.g. - the right to assign exclusive movie and television rights to their life stories, the right to assign the use of their names, or the right to waive legal claims for invasion of privacy) in this case with which the Department cannot interfere? If they do, can the Department, nevertheless, forbid the agents from receiving any compensation whatsoever from [the magazine] arising from their involvement in [this specific] investigation? Second, you express a concern with how active a role the Department can play in challenging the contracts in question.

While normally this Office is not in a position to advise on the validity of agency contracting practices or the resulting challenges which may ensue, we offer the following observations which effect both questions you have posed.

Executive Order 11222, 30 Fed. Reg. 6460 (1965), sets forth the basic framework for standards of conduct regulations, and grants authority to the Civil Service Commission (now the Office of Personnel Management, of which this Office is a part), to issue appropriate regulations implementing the Order. Those implementing regulations are government-wide and appear at 5 C.F.R. Part 735. In addition, section 207 of the Executive Order directs each agency head to supplement the Order and implementing regulations with regulations of special applicability to the particular function and activities of his agency.

With regard to outside employment and other activity, 5 C.F.R. Part 735.201a provides, in pertinent part:

An employee shall avoid any action . . . which might result in, or create the appearance of:

- (a) Using public office for private gain;
- (f) Affecting adversely the confidence of the public in the integrity of the government.

Further, 5 C.F.R. Part 735.203, outside employment and other activity provides, in pertinent part:

- (a) an employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of his Government employment. Incompatible activities include . . .
- (1) acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in circumstances in which acceptance may result in or create the appearance of conflicts of interest;
- (2) an employee shall not receive any salary or anything of monetary value from a private source as compensation for his services to the Government.

Also applicable is 5 C.F.R. Part 735.206 which provides in pertinent part:

For purpose of furthering a private interest, an employee shall not . . . directly or indirectly use, or allow the use of, official information obtained through or in connection with his Government employment which has not been made available to the general public. Equivalent language appears in the regulations of the [employee's] Department.

"The Story" is the rendition of what transpired in the course of the agents' official duties -- personal aspects of the agents' lives are merely an augmentation. "The Story" was first related to [the magazine] at the Department's request as part of official duties. Paying the agents, essentially for a report of what transpired during their investigation, will result in a private gain to the agents for what they were required to do in the course

of their official duties and responsibilities: to make a report of what transpired during their investigation (but to the Government). [Note that the contract would purport to give [the magazine] sole rights to such a report].

To permit such a result would be contrary to the public policy as expressed in Executive Order 11222.

In situations of this nature, divestiture or adverse personnel action is an appropriate remedy for bringing the employees into proper compliance with existing regulations. See for instance the statutory scheme set forth in Section 206(b)(3) of title II, Ethics in Government Act of 1978.

Please feel free to contact me or my staff for further assistance in this matter.

Sincerely,

David H. Martin
Director

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

84 x 6

Letter to an Agency Counsel dated 05/01/84

This is in response to your letter of April 2, 1984, presenting for our consideration a suggestion intended to permit [an employee's] continued participation in [a] project in your agency with the concomitant rendering of services to [a private contractor on the project] by [the employee's] wife in the role of a part-time "retainer" of that company with a predetermined total remuneration rather than in the role of an independent contractor. Although your letter does not aver that [the employee's wife] would or would not provide a "data entry component" for [the project] (see our letter of December 30, 1983, [numbered 83 x 20]), we assume that she would perform duties of that nature or other duties connected with [the project].

You ask specifically whether the proposed "form of retainer arrangement" described in your letter "could operate to remove any financial interest the [couple] would have in the existence or continuation of... the [company's] contract relating to the project?" Assuming that the terms of the "retainer arrangement" realistically placed [the employee's wife] in the role of an employee of [the company], as distinguished from her present role as an independent contractor, she would no longer have a "financial interest" in the [project contract] and therefore her change of status would lift the bar of 18 U.S.C. 208(a) against the concomitant participation of her husband in that matter. This result is the same as the one that could be alternatively achieved, notwithstanding [the wife's] continuance as an independent contractor, by your agency's grant of a waiver to [the employee] under 18 U.S.C. 208(b), a possibility we noted in our December 30th, 1983, letter to [your agency]. However, your present suggestion, like the grant of a waiver, would fail to deal with the problem we noted in that letter — that is, the appearance of impropriety. Regarding that problem, it is not the nature of the financial arrangement between [the employee's wife] and [the company] that is crucial; rather it is the husband-wife relationship which gives rise to the adverse appearance — that is, to the suggestion that [the employee] might lose his objectivity in performing his duties with regard to [the project] by reason of his wife's services on behalf of [a company with a government contract to perform services] in connection with that same project.

Finally, we do not believe the analogy you draw in the third paragraph of your letter is apt. The payment of a salary instead of the grant of a partnership interest to a lawyer who has left the service of the Federal Government for practice as a principal in a law firm is a means of avoiding the specific prohibition of 18 U.S.C. 203 against a former Government employee's sharing in compensation received by another person or entity for services rendered before any federal agency during the former employee's tenure with the Government. The presence or absence of an untoward appearance if he or she were to be made a partner and share in the firm's receipts would be irrelevant for purposes of 18 U.S.C. 203.

I trust that you will find this discussion helpful in advising [the employee].

Sincerely,

David H. Martin
Director

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

84 x 5

MEMORANDUM

Issued 5/01/84 and amended 08/24/84

SUBJECT: Summary of Acceptance and Disclosure of Travel Expenses and Related Gifts

FROM: David H. Martin
Director

TO: Designated Agency Ethics Officials, General Counsels, and Inspectors General

Because this Office has consistently received a number of questions regarding the acceptance and disclosure by executive branch employees of travel reimbursements and related gifts from private sources and because the annual filing deadline for public financial disclosure reports is again drawing near, we believe it is important to provide you with the following outline of the considerations involved in answering any questions regarding this subject. The materials and the statements set forth in this outline are not new; this is simply a compilation of the various statutes, regulations and other considerations involved in this subject area. We urge you to distribute copies of this memorandum to your field offices and deputy ethics counselors for their use. Our regional training sessions have indicated a strong need and desire for this and other similar information. With regard to this specific guidance, because the first and most important determination is whether the traveling employee is on official duty or not, this guidance is separated under those headings.

If the traveling employee is on official business -

- **1. When an executive branch employee is offered payment for travel expenses from a private source for expenses incurred in carrying out his or her official duties, the travel reimbursement expense payments can only be accepted, if at all, by the agency employing the individual on the individual's behalf. The employee may not personally accept the travel expenses without potentially violating 18 U.S.C. 209. (Note: This statement refers to the situation where there is no statutory authority for either the individual or the agency to accept the travel expenses or where there is authority but the agency has determined it would not or the employee should not accept the travel expenses. It is not intended to include the situation where the employee is allowed either by 5 U.S.C. 4111 or other statutory authority to personally accept the travel expenses and that acceptance has been approved by the agency.)
2. The agency may accept the travel expenses only if it has statutory gift acceptance authority to do so or if the gift qualifies under 5 U.S.C. 4111 discussed in paragraph 3 below. Otherwise the agency will be improperly augmenting its appropriations and running afoul of the Comptroller General's Decision B-128527 dated March 7, 1967 (46 Comp. Gen. 689). Authority to accept gifts, if it exists, will generally be found in your agency's organic statute. The authority may limit the acceptance to gifts for specific purposes and your agency must have a process to determine which offers of gifts can be accepted under that authority. An agency's authority to accept gifts, including travel expenses, cannot be granted by regulation; the grant must be made by statute. (Note: Most agencies do not have this statutory authority.)

3. If the donor is a non-profit, tax exempt institution described by 26 U.S.C. 501(c)(3), the Employees Training Act, codified at 5 U.S.C. 4111, authorizes an employee to accept the payment of travel expenses from that donor if the agency follows the regulations set forth in 5 C.F.R. 410.701 et. seq. These regulations require prior written authorization for acceptance of such travel expenses and that acceptance of the expenses does not create an actual or apparent conflict. The important considerations involved here are two: First, the organization must be categorized by the I.R.S. under section 501(c)(3). There are many tax-exempt non-profit organizations which do not fall under subsection (c)(3). The I.R.S. reading room can confirm the status of the organization if you provide the exact name of the organization and the state of incorporation. Second, simply because the organization is categorized under section 501(c)(3) does not mean that the offered travel expenses are always acceptable. If the organization seeks grants from your agency or does business with your agency, especially if its staff deals directly with the employee involved, such offered reimbursements should, in most cases, not be accepted. Again, refer to the implementing regulations.

Example: A grants official at an agency is asked to speak at a University in his official capacity and the University offers to pay his travel expenses. The University is a 501(c)(3) corporation but it has one grant and is seeking others from the agency. The employee should not be allowed to accept the travel expenses because of the appearance of a conflict of interest.

4. If your agency does not have gift acceptance authority and the donor is not a 501(c)(3) corporation, neither the agency nor the employee may accept payment for travel expenses of the employee on official business. Further, the agency may not put the employee in non-duty status to carry out what is essentially official business simply to allow the employee to accept the travel expenses.

- **5. An employee who is on official business should never accept direct reimbursement of expenses (cash) if the payment of travel expenses is allowed pursuant to the method set forth in paragraph 2 above. Direct reimbursements must be made to the agency which has either advanced the money to the employee or will in turn reimburse the employee. Once given approval in advance, an employee may accept only in-kind gifts such as the travel tickets, meals and hotel room key. Further, the agency may wish to allow the employee only those expenses which would otherwise be covered by government travel regulations as if the agency were paying, and in no case should it allow the employee to accept excessive and lavish in-kind services. See Comptroller General's Opinion B-128527 and 5 C.F.R. 735.202(f).

An employee may accept direct cash reimbursements under the terms of 5 U.S.C. 4111 from a 501(c)(3) corporation. If the employee's agency does not have statutory gift acceptance authority allowing it to accept and retain voluntary contributions, the agency is bound by the provisions of 31 U.S.C. 484 to deposit in miscellaneous receipts any reimbursements made to the agency rather than the employee. See 55 Comp. Gen. 1293. Therefore, if the donor is a 501(c)(3) corporation but your agency does not have gift acceptance authority, direct cash reimbursements for travel approved pursuant to 5 C.F.R. 410.701 et. seq. should go to the employee and the employee should reimburse the agency for any travel advance given by the agency. As a policy, however, when a direct cash reimbursement or payment to the employee is necessary, care should be taken that the payment or reimbursement is related to actual expenses and is not simply a flat per diem payment.

If the traveling employee is not on official business --

6. The employee may not accept any travel expenses or any gift from any organization which
 - 1) has, or is seeking to obtain, contractual or other business or financial relations with his or her agency;
 - 2) conducts operations or activities that are regulated by his or her agency; or,
 - 3) has interests that may be substantially affected by the performance or non performance of his or her official duty.

These standards are set forth in 5 C.F.R. 735.202(a). Agencies may have regulations which are more strict and they may also have certain exceptions based on those in 5 C.F.R. 735.202(b). It is very rare that any of the exceptions will allow payment for travel expenses from an organization which is covered by section 735.202(a). Further, if the organization itself is not a prohibited source as outlined above, but all or a substantial majority of its members are, you should consider a travel reimbursement offer from the organization as if it were from one of the prohibited sources outlined in section " 735.202(a).

Example: If a trade association comprised predominantly of members which are individually regulated by an agency offers an employee of your agency travel expenses so that he might, in his personal capacity, attend their annual convention, the employee may not accept the travel expenses. These travel expenses would be a gift from a prohibited source.

7. Finally, if the source of the payment of travel expenses or other gift is not otherwise prohibited and the employee attends the conference or meeting on annual or personal leave time, the employee may not use his or her official title as a title. These activities are prohibited by section 735.201a(a).** (The employee should also request that the host not misuse his or her title in an effort to make it appear the the employee is appearing officially or in order to draw business to a commercial endeavor.)

Example: The General Counsel of a Commission is asked to teach a course for a publisher of law texts. The agency determines that doing so is not within the mandate of the agency but approves her participating under its outside employment approval process. The General Counsel may not be "billed" by the publisher in its promotional materials listing the faculty of the course or at the course itself as Jane Doe, General Counsel, Government Commission X. If the materials provide a brief description of Ms. Doe's qualifications, it can state, along with such things as her education and other positions, the fact that she presently serves as the General Counsel of the Commission. The improper use of her position is the use of her government title as a title. She is not participating in her official capacity and it should not appear that she is, nor should the publisher be allowed to use the title to solicit business.

Public Disclosure (SF 278)

An employee required to file a public financial disclosure report (SF 278) should disclose travel expenses meeting the \$250 threshold in the manner set forth below. Note that the law treats in-kind services such as travel tickets, hotel rooms and meals as one disclosure requirement and cash reimbursements for any of those same items as a separate disclosure requirement.

If the employee is on official business —

1. When the agency has gift acceptance authority and has made the appropriate determination to accept travel expenses for an employee's travel prior to the expenses being incurred, then the employee need not disclose these expenses as the agency has accepted them, not the employee. If for any reason prior approval was not received, these expenses must be disclosed because at the time they were accepted, it was the employee not the agency making the acceptance. For the employee's sake the agency may note subsequent approval on the form if it occurred.
2. When the employee accepts the travel expenses from a 26 U.S.C. 501(c)(3) corporation pursuant to 5 U.S.C. 4111, these expenses must be disclosed. Section 4111 specifically allows the employee to accept, albeit with agency approval, and because it is a personal acceptance it is governed by the public financial disclosure requirements. Again, the agency may wish to note on the form the date the agency gave acceptance approval.
3. If an employee accepts travel expenses without the benefit of agency gift acceptance authority or coverage of 5 U.S.C. 4111, the expenses must of course be disclosed.

If the employee is not on official business —

4. All travel expenses meeting the threshold values must be disclosed unless they are paid by a relative or are required to be reported under 2 U.S.C. 434.**

Gifts from a foreign government —

5. Because the reporting threshold for gifts from a foreign government covered by the Foreign Gifts Act is lower than the \$250 threshold for reporting under the Ethics in Government Act, all such travel expenses should be disclosed under the procedures established pursuant to 5 U.S.C. 7342 and are therefore exempt from disclosure on the SF 278. (See Section 209(8)(B) of the Ethics in Government Act.) Note, however, that a gift other than reimbursement of travel expenses need only exceed the more than \$100 threshold of the Ethics in Government Act disclosure requirements. Therefore, any gift, other than travel expenses from a foreign government valued at more than \$100 but within the "minimal value" that triggers the acceptance and disclosure requirements of the Foreign Gifts Act, would have to appear on the SF 278. (In March, 1984, the GSA adjusted the "minimal value" to \$165 or less.)

Example: An employee is asked by a foreign government to participate in a symposium hosted by the government. The employee's travel expenses outside the United States are paid for

by the foreign government and as a participant she is also given a small piece of sculpture. The travel expenses have a value of \$500 and the sculpture \$125. The Foreign Gifts Act "minimal value" at the time was \$140 or less. Because the travel expenses are more than the "minimal value" for Foreign Gifts Act purposes and are therefore subject to disclosure under 5 U.S.C. 7342, she need not disclose them on her SF 278. However, because the sculpture is within the "minimal value" for Foreign Gifts Act purposes but more than the over \$100 reporting requirement of the Ethics in Government Act for gifts other than travel expenses, she must disclose the receipt of the sculpture on her SF 278.

Suggested Procedures

If your agency does not have procedures covering the acceptance of travel expenses, this Office considers the following to be essential elements which will protect not only the agency but the employee as well:

1. All offers of payment of official travel expenses must be approved in writing prior to acceptance.
2. If possible, all offers should be approved by the same office within an agency so as to provide consistency of interpretation of applicable statutes and regulations. Larger agencies which cannot centralize such approval should have a controlled delegation system.
3. All agency personnel should be made aware that such offers must be approved by the appropriate office. This is especially important for persons responsible for issuing travel orders.
4. Travel orders should note specifically what expenses are being accepted by the traveling employee and under what authority. For instance, the travel orders might note that an airline ticket and hotel room are being provided to the employee by the host and accepted pursuant to the agency's gift acceptance authority, whatever the appropriate statutory citation would be.
5. The traveling official should never be placed in a position of approving the acceptance of his or her own travel expenses.
6. If possible, a record of all travel expenses accepted should be kept by the agency in a central file.

If you have any questions concerning the acceptance of travel expenses, please feel free to contact this Office.

*Changes or additions to the citation or statement were made pursuant to a supplementary memorandum issued by this Office on August 24, 1984.

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

83 x 20

Letter to an Agency Attorney dated 12/30/83

This is in response to your request dated December 12, 1983, for our opinion on the applicability of 18 U.S.C. § 208(a) in relation to an employee of your agency in the field of data processing, and his wife.

It appears from the information you supplied with your request that the [employee's wife] is, to use [the employee's] term, a "self-employed consultant" to [a] firm which has two contracts with your Agency — one to provide services in support of an ADP/software project known as [Project 1], and a second to provide services in a project known as [Project 2]. [The employee's] characterization of his wife's relationship with [the firm], is substantiated by the terms of the Consultant Agreement she and [the firm] executed [in July, 1983].

The information you furnished also discloses that [the firm] has assigned [the wife] to provide "a data entry component" for [Project 1]; that [the employee, in his government capacity,] has a significant role as an adviser to [Project 1]; and that he is also involved, although to a lesser extent, in [Project 2]. However, it is not apparent whether [the employee's wife] is providing services to [Project 2].

Section 208(a), insofar as pertinent here, bans an employee of the federal Government from participating personally and substantially in a "particular matter in which, to his knowledge, he, his spouse [or any of certain other persons] has a financial interest". (Underlining added). Presumably your agency's contracts with [the firm], regarding [Projects 1 and 2] are separate undertakings and therefore are two "particular matters" for the purposes of § 208(a).

[The employee's wife's] role in [Project 1] is essentially that of a subcontractor of [the firm], as distinguished from an employee of the latter. Accordingly, like [the firm], she has a financial interest in the [Project 1] matter. We are therefore of the opinion that if [the wife] were to continue her work on [Project 1], the employee would be in violation of § 208 (a) and thus required to recuse himself from that matter. Under 18 U.S.C. § 208(b) the agency may grant [the employee] a waiver of the criminal restrictions if it determines that such a waiver is appropriate. Notwithstanding such a waiver, however, we are of the opinion that [the employee's] continued work on the [Project 1] matter under these circumstances raises a clear appearance of impropriety which can not be overcome by simply using the waiver powers granted to the agency.

[The employee] may carry out his responsibilities relative to [Project 2] without contravening § 208(a) as long as [his wife] does not perform services for that project. That state of affairs would not be altered were he to recuse himself from [Project 1].

I trust that the foregoing discussion will be of guidance to you in resolving this matter.

Sincerely,

David H. Martin
Director

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

83 x 18

Letter to a DAEO dated 11/16/83

This is in response to your request for our opinion as to whether [a] Commissioner [in your agency] must continue to recuse himself from participation in adjudicatory proceedings in which one of the parties before the Commission is represented by a law firm with which the Commissioner's son is engaged as an associate. Our view is that recusal from all such matters is not absolutely necessary, but that each case should be examined to determine whether the Commissioner's participation would be appropriate under the circumstances.

Our analysis of your question began with the criminal conflict of interest statutes, which we conclude would not preclude [the Commissioner's] participation in matters in which one of the parties is represented by his son's law firm. The only criminal statute which comes close to being applicable, 18 U.S.C. §208, precludes official participation by a government employee in matters in which he, his spouse, or his minor child has a financial interest, and thus does not reach the present situation.

Beyond the criminal statutes, [the Commissioner's] freedom to participate in official matters is limited both by the constitutional requirement of due process and by applicable standards of conduct. We do not read the due process cases as requiring recusal under the circumstances you have presented. See, e.g., Withrow v. Larkin, 421 U.S. 35 (1975); Duffield v. Charleston Area Medical Center, Inc., 503 F. 2d 512 (4th Cir. 1974); Cinderella Career and Finishing Schools, Inc. v. FTC., 425 F. 2d 583 (D.C. Cir. 1970); American Cyanamid Co. v. FTC., 363 F. 2d 757 (6th Cir. 1966). However, you should be aware that in the absence of informed consent by all parties, participation by the Commissioner in a case in which one party is represented by his son's law firm might provide a basis for a subsequent challenge to the Commission's decision.

Government-wide standards of conduct provide as follows:

An employee shall avoid any action, whether or not specifically prohibited . . . , which might result in, or create the appearance of:

- (a) Using public office for private gain;
- (b) Giving preferential treatment to any person;

- (c) Impeding Government efficiency or economy;
- (d) Losing complete independence or impartiality;
- (e) Making a Government decision outside official channels; or
- (f) Affecting adversely the confidence of the public in the integrity of the Government.

5 C.F.R. §735.201a. [Citation to agency regulations deleted]. Assuming that his judgment would not in fact be affected, we must also consider whether an impermissible adverse appearance would result from [the Commissioner's] participation in a matter in which one of the parties is represented by a law firm with which the Commissioner's son is an associate. Because the Commission's proceedings are adjudicatory in nature, we believe that guidance may be drawn from the rules applicable to judges. See Duffield v. Charleston Area Medical Center, *supra*.

Disqualification of federal judges is governed by 28 U.S.C. §455. That section, which is in effect a codification of Canon 3 of the ABA Code of Judicial Conduct, provides in pertinent part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

...

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person: (i) Is a party to the proceeding, or an officer, director, or trustee of a party; (ii) Is acting as a lawyer in the proceeding; (iii) Is known to have an interest that could be substantially affected by the outcome of the proceeding; or (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

Like 18 U.S.C. §208, section 455(b)(4) is limited to spouses and minor children and does not reach the present situation. However, problems may be presented by section 455(a) and Section 455(b)(5). It could be argued, for example, that by virtue of his firm's representation of a party, the Commissioner's son is acting as a lawyer in the proceeding. However, the commentary to the parallel provision in Canon 3 of the Judicial Code of Conduct provides:

The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that 'his impartiality might reasonably be questioned' . . . or

that the lawyer-relative is known by the judge to have an interest in the law firm that could be 'substantially affected by the outcome of the proceeding' . . . may require his disqualification.

Thus, it seems that the rules applicable to judges would require an inquiry similar to that required by the standards of conduct: whether under the particular circumstances the Commissioner's impartiality might reasonably be questioned, or, put another way, whether the Commissioner's official participation would create an intolerable adverse appearance.

In SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977), it was held that the trial judge should have recused himself because his impartiality might reasonably be questioned where his brother was a partner in a firm which had entered a general appearance for one of the parties. We recognize that the situation you have presented is different, in that the Commissioner's son is an associate with the law firm and is thus less likely to have a financial interest in the outcome of any particular case. In United States ex rel. Weinberger v. Equifax, 557 F. 2d 456 (5th Cir. 1977), cert. denied, 434 U.S. 1035 (1978), it was held that the district judge did not err in declining to recuse himself where his son was an associate with a law firm which participated in the proceedings. However, we cannot go so far as to say that the Commissioner's son's status as an associate would negate any appearance problems that might arise under any circumstances. Therefore, our recommendation is that the Commissioner consider on a case-by-case basis whether his participation in any particular matter would create any of the adverse appearances prohibited by the standards of conduct.

Your second question was whether our opinion would be different in a case in which the Commissioner's vote is needed to break a tie vote. We wish to distinguish between the situation where an individual's participation is essential for the presence of a quorum, or because no other decision maker is available, from the one you have presented. In the former case, the rule of necessity operates to authorize, or perhaps to require, participation where recusal would otherwise be mandated See., e.g., United States v. Will, 449 U.S. 200 (1980); Duffield v. Charleston Area Medical Center, *supra*. In the situation you have posed, the potentially biased individual would be called in at some late stage of the proceeding to cast what would obviously be the deciding vote. This, in our view, would be far worse than his having participated in the matter from the beginning.

We hope this opinion provides some guidance to you and to [the Commissioner]. Please feel free to contact us if we can be of assistance on this or any other matter in the future.

Sincerely,

David H. Martin
Director

United States of America
**Office of
Government Ethics**

Office of Personnel Management
Washington, D.C. 20415

84 3 7 4 10 1

MAY 30 1985

Honorable William S. Cohen
Chairman, Subcommittee on Oversight
of Government Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

JUN 4 1985

Dear Mr. Chairman:

This is in response to your letter of May 16, 1985 requesting certain information pertaining to your subcommittee's April 24th hearing on the Office of Government Ethics. I understand that this request was informally handled by a member of my staff on May 16th, when copies of several informal advisory opinions rendered by the Office of Government Ethics on the issue of the appearance of impropriety were forwarded to your subcommittee staff.

Sincerely,


David H. Martin
Director

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

11 APR 1980

David O. Bickart, Esq.
Deputy General Counsel
Environmental Protection Agency
Washington, D. C. 20460

Dear Mr. Bickart:

This is in response to your request of January 15, 1980, for our opinion on the question whether section 207(c) of the Ethics in Government Act (Ethics Act), 5 U.S.C. App. 207(c), has eliminated the public financial reporting requirements of the following statutory provisions: § 26(e) of the Toxic Substances Control Act, 15 U.S.C. 2625(e); § 1007 of the Solid Waste Disposal Act, 42 U.S.C. 6906; § 318 of the Clean Air Act, 42 U.S.C. 7618, and § 12 of the Environmental Research, Development and Demonstration Authorization Act of 1978, P.L. 95-155, 91 Stat. 1263. These statutory requirements are substantially similar in their language and effect, and all were adopted by Congress before the passage of the Ethics Act. They oblige policy-making officials who work in their respective areas of application to report certain personal financial interests for public disclosure and they authorize criminal prosecution for a failure to comply.

Section 207(c) of the Ethics Act reads as follows in pertinent part:

The provisions of this title requiring the reporting of information shall supersede any general requirement under any other provision of law or regulation with respect to the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest.

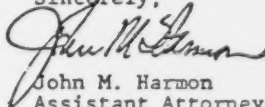
For the reasons advanced below, we have concluded that section 207(c) has displaced the four cited provisions of law and brought the provisions of Title II of the Ethics Act into play in their stead.

The language of § 207(c) lays down only two pre-requisites for the supersession by Title II of a statutory or regulatory reporting requirement. The first is that a "general" requirement must be involved and the second is that the requirement be aimed at real or apparent conflicts of interest. Applying these pre-requisites in reverse order, we first join in your conclusion, derived in part from legislative history, that the subject statutory provisions were indeed intended to prevent conflicts of interest. As for the other pre-requisite, since each statutory reporting provision is applicable to the occupants of positions in your agency that are categorized by the provision in general terms (§ 26(e) of the Toxic Substances Control Act is also applicable in the Department of Health, Education and Welfare), each in our opinion is unquestionably a general requirement within the meaning of § 207(c). Cf. H. Rept. No. 95-642, Part 1, 95th Cong., 1st sess., p. 51 (1977), where the Committee on Post Office and Civil Service cited the financial reporting system created for employees of the Department of Energy by P.L. 95-91, §§ 603 and 604, 42 U.S.C. 7213 and 7214, as an example of a requirement intended for supersession by what is now § 207(c) of the Ethics Act.

It should be noted also that our answer to your inquiry is strongly supported by the obvious Congressional purpose of establishing uniform financial reporting requirements and procedures throughout the Executive Branch by means of § 207(c).

To repeat, we are of the opinion that § 207(c) has made a dead letter of the four financial reporting enactments you called to our attention and has made Title II of the Ethics Act operative in their stead.

Sincerely,



John M. Harmon
Assistant Attorney General
Office of Legal Counsel

JAN 13 1980

Honorable John Harmon
Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Harmon:

As the Environmental Protection Agency (EPA) official responsible for advising the Agency concerning the various conflict of interest and financial reporting laws which affect Agency employees, I request that the Office of Legal Counsel answer the following questions:

Does Section 207(c) of the Ethics in Government Act (P.L. 95-521) eliminate the public financial reporting requirements of Section 26(e) of the Toxic Substances Control Act (15 U.S.C. 2625(e)), Section 1007 of the Solid waste Disposal Act (42 U.S.C. 6906), Section 318 of the Clean Air Act (42 U.S.C. 7618), and Section 12 of the Environmental Research, Development, and Demonstration Authorization Act of 1978 (P.L. 95-155, 91 Stat. 1263)?

This question has been unanswered since the passage of the Ethics in Government Act. It was our understanding that the Office of Legal Counsel would render its opinion on the effect of the Ethics in Government Act financial reporting provisions on prior financial disclosure statutes, such as the four above, which affect Executive Branch employees. I have recently been informed that the Office of Legal Counsel has no immediate plans to issue such an opinion.

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I believe that it is very important to answer this question. The Agency's employees are subject to a number of duplicative financial reporting provisions: the Ethics in Government Act, Executive Order 11222, and the provisions of the four statutes mentioned above. Some employees may have to file as many as four overlapping public financial reports each year, as well as a confidential report under the Executive Order. The public reports represent a potential invasion of the privacy interests of the Agency's employees.

It is our legal opinion that Section 207(c) of the Ethics in Government Act clearly eliminates the reporting requirements of the Toxic Substances Control Act (TSCA), the Solid Waste Disposal Act (SWDA), the Clean Air Act (CAA), and the Environmental Research, Development, and Demonstration Authorization Act of 1978 (ERDDAA). However, since there is a criminal penalty under each of these statutes for failure to make required reports, we are seeking a ruling from the Department of Justice consistent with the Department's often-stated position that only the Department can interpret criminal laws. Because of the potential criminal sanctions for failure to file reports, it is imperative that the Department rule on this issue.

Section 207(c) states in pertinent part:

The provisions of this title requiring the reporting of information shall supersede any general requirement under any other provision of law or regulation with respect to the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest.

This language makes it clear that the comprehensive financial reporting scheme of the Ethics in Government Act was to replace such reporting requirements under more narrow pre-existing statutes.

The House Judiciary Committee on November 2, 1977 reported its version of the Act containing the same wording of Section 207(c) and stated: "Subsection (c) provides that the provisions of title I of the bill as to the reporting of information are to supersede any other statutory requirement for reporting of information for the purpose of preventing conflicts of interest or apparent conflicts of interest...." (House Report No. 95-800, page 43)

It is clear that the reporting provisions of TSCA, CAA, and ERDDAA were enacted for the purpose of preventing conflicts of interest or apparent conflicts of interest. The financial disclosure provision of TSCA originated in House bill H.R. 14032. It was added in a floor amendment during which the following remarks were made by Congressman Murphy of New York: "I think it is a worthy and constructive amendment. It would certainly prevent conflicts of interest or even allegations of conflicts of interest." (p. 622, Legislative History of the Toxic Substances Control Act, House Committee on Interstate and Foreign Commerce, December 1976). Similarly the financial disclosure provision of CAA originated in House bill H.R. 10498. It was added in a floor amendment during which the following remarks were made by Congressman Rogers: "The amendment simply provides, as the gentlemen says, sunshine in Government and requires certain employees of EPA simply to file a statement stating that they have no conflicts of interest." (Congressional Record, September 8, 1976, H 9531).

The intention that the reporting provisions of the Ethics in Government Act replace specific reporting requirements under these types of statutes is further supported by the decision of Congress not to include similar provisions in newer legislation. The Clean Water Act, another EPA statute, was amended in 1977. H.R. 3199, as introduced and passed by the House, contained a financial disclosure provision similar to that in TSCA, SWDA, CAA, and ERDDAA. In the House-Senate Conference considering the bills passed by both houses, the financial disclosure provision of the House bill was dropped. The Conference Committee made the following statement: "The conferees determined that financial disclosure requirements would be more appropriately dealt with in general legislation applicable to all Federal agencies." (page 111, Conference Report, House Report No. 95-830, December 6, 1977). It is interesting to note that at the time of this decision, the bills which would eventually become the Ethics in Government Act had passed the Senate and been voted out of the House Judiciary Committee, respectively. It is also interesting to note that the Environmental Research, Development, and Demonstration Authorization Act of 1979, which became law October 18, 1978 six days before the Ethics in Government Act, did not contain the financial disclosure provision that was contained in the previous year's ERDDAA. This seems to reflect Congress' belief that the Ethics in Government Act

would deal with reporting of financial information by high level officials such that other legislation would be unnecessary. We have made a brief review of other legislation passed by Congress since the Ethics in Government Act and have found no separate financial disclosure requirements of the kind found in TSCA, SWDA, CAA, and ERDDAA.

Further support for the idea that the Ethics in Government Act reporting provisions would replace other reporting provisions such as TSCA, SWDA, CAA, and ERDDAA is found in the other provisions of the Act and the differences between it and the four statutes in question. Section 204(a) of the Act provides a civil penalty for an individual who fails to file; TSCA, SWDA, CAA, and ERDDAA have a criminal penalty of fine and imprisonment for failure to file. Section 205(c) of the Act puts restrictions on the uses that can be made of personal financial reports obtained by the public; TSCA, SWDA, CAA, and ERDDAA contain no such protections. Section 202 of the Act provides very specific detailed requirements as to what information is to be supplied in the reports; TSCA, SWDA, CAA, and ERDDAA provide only general standards. Section 206 of the Act provides for specific review procedures to be followed in examining and evaluating the reports; TSCA, SWDA, and ERDDAA do not have any standards. These differences all point to the conclusion that the Act addresses the issues in greater detail and contains an overriding balancing of the privacy interest and the public interest.

If the provisions of TSCA, SWDA, CAA, and ERDDAA were still in effect, high level Executive Branch officials would be subject to a different set of standards than lower level officials. Specifically, the high level officials would only be subject to a civil penalty for failure to file while their subordinates would be subject to a criminal penalty. High level officials would be protected from misuse of the information in their financial reports which are made public while their subordinates would not be protected from misuse of their public financial reports.

Finally, in considering the bills which became the Ethics in Government Act, the House and Senate were very concerned with balancing the privacy interests of Government employees against the public interest in disclosure in light of the tests in Buckley v. Valeo, 424 U.S. 1 (1975). For example, the House Judiciary Committee stated that there was a dilemma involved in accommodating the public policy considerations in favor of public financial disclosure and protecting person privacy. The Committee stated: "The

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solution to the 'dilemma,' obviously, is to balance these considerations as equitably as possible--furnishing some assurance to reporting individuals that there will be some control over the dissemination of sensitive information while avoiding the possible chill of overregulation." The Congress reached this balance in the Act for all Government employees providing who should file, what should be reported, the public availability of reports, and protections against misuse of information.

I trust you will be able to answer our question as quickly as possible. In the interim, I have directed Agency employees to continue to file the financial statements required by TSCA, SWDA, CAA, and ERDDAA. However, I have directed that they not be made available to the public pending the resolution of this legal question. In the event you find that the reporting requirements are still in effect, we will file the forms in a public place. In the event you find the requirements have been eliminated we will cease to require the reports and will dispose of the reports which have been filed since the Ethics in Government Act became law.

Sincerely,

David Bickart

Deputy General Counsel

David O. Bickart

Deputy General Counsel (A-130)

A-134:JCNelson:mkc:1/15/80:x.50794:Rm.517W.T.
Tape 3, Document 46



U.S. DEPARTMENT OF JUSTICE

Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

100-100000

MEMORANDUM FOR DAVID R. SCOTT
Acting Director
Office of Government Ethics
Office of Personnel Management

Re: Confidential Financial Disclosure Reports

This memorandum responds to your request for our opinion concerning the range of the President's discretion in determining what information should be included in confidential financial disclosure reports filed by federal employees in positions below the level of GS-16 in the General Schedule. You have explained that the Office of Government Ethics plans to prepare a draft Presidential directive or order establishing a government-wide system of confidential financial disclosure for certain such employees, which would be issued pursuant to § 207(a) of the Ethics in Government Act of 1978 (the Act). ^{1/} That subsection provides, *inter alia*, that the President "may require officers and employees in the executive branch" who are not covered by the Act's provisions establishing a system of public financial disclosure "to submit confidential reports in such form as is required by this title." (Emphasis added.)

You have asked us to explain the meaning of the foregoing underscored language, "in such form as is required by this title." In particular, you have asked, first, whether it requires that confidential financial disclosure reports contain the same information required by other provisions of title II of the Act to be included in public financial disclosure reports. Second, you have asked, assuming that the answer to the first question is yes, whether the confidential financial disclosure reports must be identical in every respect to public financial disclosure reports, which now are submitted on Form SF 278.

^{1/} Pub. L. No. 95-521, 92 Stat. 1824. Title II of the Act, which contains the provisions establishing financial disclosure requirements for Executive personnel, is codified at 5 U.S.C. App. (1976 ed., Supp. V 1981).

For the reasons discussed below, we have concluded, first, that § 207(a) is most properly construed as requiring that confidential financial disclosure reports include the same information required by other provisions of title II to be included in public financial disclosure reports. This construction means, in essence, that when the statute requires certain information to be requested in public financial disclosure reports, the same information must be requested in confidential financial disclosure reports prepared for a government-wide system of confidential financial disclosure ordered by the President pursuant to § 207(a). In response to your second question, we do not believe that such confidential financial disclosure reports necessarily must be identical to public financial disclosure reports to the extent that the public financial disclosure system, utilizing Form SF 278, includes more detailed information than is required by title II. All that is necessary, again, is that such confidential financial disclosure reports provide the same information that is required to be contained in public financial disclosure reports.

I. Background: The Statutory Scheme in General and the Language of § 207(a) in Particular

Title II of the Ethics in Government Act establishes a system of financial disclosure for Executive Branch personnel. A chief feature of the statutory scheme is that financial reports prepared by certain officials subject to the statute's provisions are to be made available to the public by the agency with which the reports are filed. ^{2/} In addition, each agency is directed to permit inspection of each such report (or a copy thereof) by "any person requesting such inspection or copy." ^{3/}

The required contents of financial reports to be made available to the public are set forth in considerable detail in § 202 of the Act. In general, such reports are to include the following categories of information: the source, type and amount of income; gifts above certain values; interests in property; liabilities; receipts from the sale or exchange of real property or securities; the identity of all positions held as an officer, director, trustee, partner, proprietor, employee or consultant of any business enterprise; and any

^{2/} Section 205(a) of the Act.

^{3/} Section 205(b) of the Act.

agreements with past or future employers. 4/ The persons covered by the public financial disclosure requirements of § 202 include, inter alia, the President, the Vice President, and each officer or employee in the Executive Branch whose position is classified at GS-16 or above or the basic pay for which is fixed at a rate equal to or greater than the minimum rate of basic pay for GS-16. 5/

Title II includes a provision, § 207(a), authorizing the President to establish a system of confidential, or non-public, financial disclosure for employees not otherwise covered -- that is, for employees in the Executive Branch in positions below the level of GS-16. Section 207(a) provides:

The President may require officers and employees in the executive branch (including the United States Postal Service and members of the uniformed services) not covered by this title to submit confidential reports in such form as is required by this title. Subsections (a), (b), and (c) of section 205 [which deal with the public availability of financial disclosure reports] shall not apply with respect to any such report.

(Emphasis added.)

The question presented by the foregoing provision -- and by your opinion request -- is what the phrase, "in such form as is required by this title," mandates.

II. Analysis: the Legislative Purpose Behind § 207(a) as Revealed in the Legislative History

Normally, of course, analysis of legislation begins with the statutory language itself; legislators are presumed to have intended to accomplish what the ordinary meaning of the law denotes. 6/ This canon of construction, however, is of limited utility in the present situation. The most direct

4/ Section 202 of the Act (which is denominated, "Contents of reports").

5/ See § 201(f) (listing the categories of covered officials).

6/ See, e.g., Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979); International Brotherhood of Teamsters v. Daniels, 439 U.S. 551, 558 (1979).

reading of the language, "in such form as is required by this title," appears foreclosed from the outset: title II does not anywhere specify a form as such (as opposed to the contents) of financial disclosure reports. 7/ On this basis, one might suggest that the phrase is essentially meaningless, and therefore that it provides no constraint whatsoever on the President's discretion to require employees to file confidential financial disclosure reports under § 207(a). The critical problem with any such suggestion, however, is that it ignores the fundamental precept that statutory language is to be given meaning wherever possible, and is not to be assumed to be a nullity. 8/

In the present situation, one can discern the purpose underlying the quoted language of § 207(a) by reference to certain, albeit at times somewhat less than completely determinate, passages in the legislative history. Of importance are remarks in the leading Committee report on the bill that eventually was enacted as the Ethics in Government Act, and in the House floor debate about the specific provision in question. These discussions, which we will analyze, indicate Congress' intent that confidential financial disclosure reports and public financial disclosure reports would constitute one comprehensive system of financial disclosure. They support the view that, despite § 207(a)'s use of the word "form," what Congress intended was that the substance of the two types of reports be essentially synonymous. So understood, the quoted language of § 207(a) may be viewed as a shorthand reference to the information required by title II to be included in public financial disclosure reports.

A. The House Committee Report

Of particular importance is the report of the House Committee on Post Office and Civil Service, 9/ which underscored the Committee's intent that there be one "comprehensive" system of financial disclosure for federal employees. The

7/ The word "form" is defined, *inter alia*, as "the shape and structure of something as distinguished from the material of which it is composed." Webster's Third New International Dictionary 892 (1976).

8/ See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979).

9/ See H.R. Rep. No. 642, Part 1, 95th Cong., 1st Sess. (1977).

report also contrasted the bill's "comprehensive" system with the system of confidential financial reporting pursuant to Executive Order No. 11222, ^{10/} which was the source of authority for such a financial disclosure system prior to the Act's passage:

The committee firmly believes that legislation relating to financial reporting and disclosure for executive branch employees should be comprehensive. Under H.R. 6954 [which was the Carter Administration's bill] and similar proposals, financial reporting requirements for the executive branch only go halfway. With respect to employees at GS-15 or below, the financial reporting system established and administered under Executive Order No. 11222, the same system whose failure has resulted in the need for this legislation, will remain in place. Under the committee's bill, all financial reporting and disclosure in the executive branch will be pursuant to statute. The current executive order system will be abolished. ^{11/}

(Emphasis added.)

Accordingly, the Committee report stressed that "the executive order system" of confidential financial reporting -- which, in fact, has not to date been fully supplanted -- is to be "abolished" by a system pursuant to statute that is to be "comprehensive." In discussing the possible charge that the Committee's bill would impose too great a paperwork burden on employees, the report reiterated that the bill's system is to be comprehensive:

To the extent that there is an increase in paperwork, the committee believes such an increase is clearly justified by the benefits which will be achieved through having one comprehensive reporting system for all civilian employees in the executive branch. ^{12/}

(Emphasis added.)

^{10/} 30 Fed. Reg. 6469 (May 11, 1965).

^{11/} H.R. Rep. No. 642, Part 1, 95th Cong., 1st Sess. 26 (1977).

^{12/} Id. at 27.

The foregoing passages indicate that the Committee did not intend that there would be more than one financial reporting system. To be consistent with this general intent, it seems necessary to construe § 207(a) of the Act as requiring that confidential financial reports contain the same information as required for public financial reports. 13/

B. House Floor Debate

Support for the foregoing interpretation of § 207(a) may be gleaned from the floor debate in the House of Representatives in September, 1978, one month before the Act was enacted. On September 20, 1978, Representative Schroeder, Subcommittee Chair of the House Post Office and Civil Service Committee, summarized some of the provisions of the Committee's bill, noting that:

. . . . there is a provision for confidential filing by lower level personnel, but it must be done, as the Post Office and Civil Service Committee's bill required, according to the same form as public filing will be. 14/

(Emphasis added.)

On September 27, 1978, Representative Harris described the confidential reporting provision as follows:

The language [as enacted in § 207(a)] says that the President may require officers and employees

13/ It is possible to argue that a comprehensive system of reporting could include two different types of disclosure reports. However, such a suggestion seems to ignore the emphasis on "one" system in the quoted passages from the Committee report. See H.R. Rep. No. 642, Part 1, 95th Cong., 1st Sess. 27 (1977). Moreover, it disregards that the Congress clearly sought to abolish the separate Executive Order system of confidential financial reporting, and thereby sought to create one comprehensive system; it would be counterproductive from this perspective to authorize two different reporting systems after making such an effort to eliminate the separate confidential reporting system.

14/ 124 Cong. Rec. 30419 (Sept. 20, 1978).

in the executive branch, including the U.S. Postal Service and uniformed services not covered by this part[,] to submit confidential reports in such form as required by this part. 15/

(Emphasis added.)

Although the foregoing comments are not inordinately illuminating because they merely repeat the statutory word "form" without elaborating on its meaning, they nonetheless do confirm that the phrase "such form" (which appears in § 207(a) as enacted) was intended to have the identical meaning as the phrase "the same form." Even though this does not tell us what "form" means, at least the comments confirm generally that deviations from the public financial reporting requirements in title II are to be disfavored in the establishment of the confidential financial reporting system.

This understanding of § 207(a) is buttressed by additional floor discussion involving Representatives Gonzalez, Wiggins and Danielson on September 27, 1978. Representative Gonzalez spoke in opposition to any provision giving the President broad discretion to require such confidential financial reports as the President may prescribe, 16/ stating that any such provision would make the President "a total czar" in this context. 17/ In response, Representative Wiggins noted that "[e]arlier on during the consideration of this bill, broad authority was given to the President to require any information of any Government employee" However, such a grant of broad discretion was criticized, and "instead much narrower language was adopted." 18/ Representative Wiggins added:

15/ 124 Cong. Rec. 31985 (Sept. 27, 1978).

16/ The language that Representative Gonzalez particularly objected to provided that: "The President may require officers and employees of the executive branch not covered by this title to submit confidential reports in such form and manner as he shall prescribe." 124 Cong. Rec. 32002 (Sept. 27, 1978).

17/ 124 Cong. Rec. 32002 (Sept. 27, 1978).

18/ Id.

Now, under section 207(a), the President may require of those employees who are not covered confidential reports, (sic.) and I quote now from the bill 'in such form as is required by this part.'

It was the intent of the drafters of that language to limit the power and the discretion of the President to require only such information from noncovered employees as would be compelled of covered employees under this bill. 19/

(Emphasis added.)

Representative Wiggins then asked Representative Danielson -- who was Subcommittee Chairman of the House Judiciary Committee, which had been involved in drafting the bill -- whether his understanding of § 207(a) was correct:

Rep. Wiggins: Is it not true that the President could not compel the confidential report of information which was not required to be disclosed under this bill?

Rep. Danielson: That is correct . . . The President would have a right to require officers and employees who are not covered by this part . . . to submit [a] confidential report but in a form which is prescribed by this part.

Rep. Wiggins: Yes. 20/

(Emphasis added.)

The foregoing remarks are significant, first, because they confirm that the limitation in § 207(a) on the President's discretion in determining what information to require in confidential financial disclosure reports was intended by Congress to be a meaningful constraint. This confirmation directly contravenes the suggestion that the statutory language, because of the confusion it creates, should be ignored. More particularly, the remarks support the view

19/ Id.

20/ Id. at 32003.

that Congress intended that the confidential financial disclosure reports would request the same information as the public financial disclosure reports governed by title II. Any other interpretation, in our view, would not satisfactorily take account of Representative Wiggins' statement that the bill's drafters intended to allow the President to require in confidential reports "such information from noncovered employees as would be compelled of covered employees. . . ." (Emphasis added.) In short, confidential financial reports are not to require different information, but rather are to require "such information . . . as" called for by title II in public reports.

This interpretation is not contradicted by any other indications of Congressional intent of which we are aware.

III. Conclusion

In conclusion, we believe that § 207(a) requires that reports prepared as part of a government-wide system of confidential financial disclosure contain the same information required by other provisions of title II to be contained in public financial disclosure reports. 21/ To the

21/ Considerations of administrative convenience and efficiency may well support the use of essentially identical forms for public as for confidential financial reporting. While we express no view regarding the policy implications of this matter, in order to preserve the truly confidential character of confidential reports, it would appear prudent to assure that public and confidential reports be readily distinguishable in some fashion by those who process them.

extent that Form SF 278 contains any request for information that is not specifically required by title II, such information need not be requested on confidential financial disclosure reports. 22/

Ralph W. Tarr

Ralph W. Tarr
Deputy Assistant Attorney General
Office of Legal Counsel

22/ This conclusion is not only borne out by the legislative history, discussed above, but also is consistent with the views expressed in earlier Office of Legal Counsel memoranda, to which we adhere. In an opinion dated March 26, 1979, for the Director of this Department's Internal Audit Staff, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, it is stated: ". . . § 207(a) appears to require that any confidential reports the President may require under that section be in the same form as the public forms filed by higher level personnel. If so, the present more limited confidential forms now in use in the Department would have to be replaced by the more extensive forms to be filed by persons GS-16 and above." (Page 3; emphasis added.) In a letter dated May 1, 1979, to Mr. Bernhardt Wruble, Director of the Office of Government Ethics, Office of Personnel Management, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, it is stated that: "The effect of §§ 207(a) and (c), when read together, would appear to be that agencies may no longer require employees to file the more limited confidential reports on the authority of E.O. 11222 but that the President may issue a new Executive Order requiring Executive Branch employees to file, on a confidential basis, reports containing all the information required in Title II . . . Based on the language and legislative history of § 207, then, it would appear that the confidential reporting program under Executive Order 11222 has been superseded and that any confidential reports required by the President in the future must be on Forms 287 or 287A or an equivalent form." (Page 2; emphasis added.) (We should add that the form for confidential financial disclosure was, and is, Form 278, not 287.)



U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

JUN 21 1984

Honorable David H. Martin
Director
Office of Government Ethics
1717 H Street, N.W., Rm. 436
Washington, D.C.

Dear Mr. Martin:

This is in response to your letter of March 2, 1984 requesting our review of a legal memorandum ("March 2 Memorandum") regarding the requirements for confidential financial disclosure by certain Executive Branch employees and officials. The author(s) of the March 2 Memorandum have not been identified 1/, but the contents of the Memorandum have been endorsed in varying degrees by thirty-five Executive Branch agency legal officials. 2/

1/ We gather from some of the materials submitted with the March 2 Memorandum that the author may have been someone in the Office of the General Counsel of the National Aeronautics and Space Administration. We responded once before to an unsigned memorandum on this same subject from that office. See generally Memorandum for Richard A. Hauser, from Theodore B. Olson, June 30, 1983. The arguments in the March 2 Memorandum, while more detailed, are not materially different from those in the prior unsigned memorandum.

2/ The number thirty-five is attained by including thirteen separate legal officials within the Department of Defense as well as "concurrences" in various forms by numerous acting, deputy, associate or assistant general counsels of Executive Branch agencies and "independent" regulatory bodies. While we of course respect the competence, integrity and good faith of the various legal officials who concurred in the March 2 Memorandum, we cannot resolve difficult legal questions on the basis of a referendum. See 28 U.S.C. §§ 511-513; Executive Order No. 12146 (July 19, 1979), 44 Fed. Reg. 42657; and 28 C.F.R. § 0.25 (all describing the role of the Attorney General in resolving legal disputes).

The principal legal conclusion articulated by the March 2 Memorandum is contrary to the previously expressed legal views of this Office. The legal officers who have participated in this venture ^{3/} apparently wish us to reconsider again our views on the subject.

THE ISSUE

Title II of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (the Act), requires certain high level and policy officials in the Executive Branch to make annual public disclosure of personal financial information regarding their income, assets, investments, financial affiliations, liabilities, gifts and reimbursements. At issue here is the meaning of Section 207(a) of the Act which provides in pertinent part as follows:

The President may require officers and employees in the executive branch . . . not covered by this title to submit confidential reports in such form as is required by this title.

In short, this provision allows the President to require lower level Executive officials to submit confidential financial disclosure statements "in such form as is required by this title."

We have opined on two previous occasions that the phrase "in such form as is required by this title" means that if the President exercises his discretion to require any Executive Branch officers or employees to submit confidential reports under this provision, those reports must contain essentially the same information required for public disclosure by other officials under the same title of the Act. The alternative interpretation advanced by the March 2 Memorandum is that the quoted phrase grants the President "discretion to determine what information should be required in confidential statements as long as he does not require more information than is

^{3/} We attach some significance to the fact that the Office of Government Ethics has not endorsed the legal conclusions contained in the March 2 Memorandum. In fact, various persons in your Office have advised us orally in the past that they do not disagree with the conclusions of this Office on the legal issues discussed in this letter.

contained in the public disclosure reports." March 2 Memorandum at 39. 4/

After having reviewed the statute and its legislative history in exhaustive detail on yet another occasion and having subjected this issue to close analysis by several different lawyers in this Office, we remain convinced that our initial interpretation of the statute is the correct one. The alternative, while superficially appealing, and certainly more convenient for the Executive Branch, ascribes to the statutory language a meaning that is both incongruous with the words used by Congress and lacking adequate support in the legislative history.

We are not unmindful that Congress could have expressed its intentions more clearly and that the legislative history of this enactment is, as is frequently the case, not a model of clarity. We are also keenly aware that a broad, rigid and indiscriminate imposition of the statute's requirements would create unpleasant and perhaps unnecessary administrative burdens. Moreover, even a modest and reasonable application of the statute as we have interpreted it will apparently require a great deal more paperwork, inconvenience, expense and administrative burden than is necessary from the standpoint of the agencies that have considered the same issue. Nevertheless, because the alternative interpretation cannot in our opinion be squared in good faith with the statute or its legislative history, and because we feel that we cannot engage in Executive Branch revision of the statutory requirements to serve the interests of expediency, we must reaffirm our previous conclusion.

PRACTICAL CONSIDERATIONS

Before discussing the legislative history of Section 207(a) and the arguments made in the March 2 Memorandum, we would like to make several practical points that should be considered in applying Section 207(a).

4/ Addendum 2 (Department of Interior) to the March 2 Memorandum is inconsistent with this conclusion. In this addendum the Department of Interior sets forth a view that it should be permitted to collect more detailed information from certain employees in order to enhance its enforcement of the Surface Mining Act.

1. Section 207(a), as we interpret it, does not require the President or any federal agency to collect financial disclosure reports from anyone beyond those high-level employees listed in the Ethics Act. When Congress established the public disclosure system under the Ethics Act, it eliminated all then-existing financial disclosure requirements imposed by law or regulation, including the system of confidential reporting established by Executive Order 11222. ^{5/} See § 207(c). While Section 207(a) permits the President to reimpose confidential reporting requirements on lower level employees, he need not do so at all, and he certainly need not do so to an extent that will create unjustifiable burdens on federal agencies or employees. In our view, it is well within the discretion of the President, indeed it is his responsibility, to weigh all of the relevant considerations before extending the financial reporting requirements of the Ethics Act to any given class of employees.

2. Section 207(c) of the Act purports to supersede only "any general requirement under law or regulation with respect to the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest." § 207(c) (emphasis added). Because the primary purpose of Section 207(a) seems to be to permit the President to replace the general requirements superseded pursuant to Section 207(c), we would read the direction in Section 207(a) concerning the content of reports to apply only to "any general requirement under law or regulation." We accordingly would not read Section 207(a) to prohibit the President, or a Federal agency, from requesting from particular employees on an ad hoc basis information different from that required by the Ethics Act. For example, under this interpretation an agency could request an employee being investigated for a conflict of interest to provide financial information beyond that required by the Ethics Act. ^{6/}

^{5/} In this regard we must again question Addendum II to the March 2 Memorandum which describes the financial reports collected by the Department of the Interior under the Surface Mining Act. In an Opinion dated April 11, 1980 (reconsidered at the request of the Solicitor of Interior on January 26, 1981), we advised that the reporting provisions of the Surface Mining Act were expressly repealed by Section 207(c) of the Ethics Act.

^{6/} Construing subsections 207(a) and (c) to complement one another also mitigates possible conflict between the statute and any inherent constitutional powers of the President to require accountability from Executive branch employees.

3. Similarly, we do not read Section 207(a) to prohibit the President, or the federal agencies, from requesting employees to certify that they understand and are in conformity with particular restrictions that apply to them by virtue of their federal employment. For example, the Department of the Interior could require annual certifications by employees covered by the Surface Mining Act that they understand that they are not permitted to have any stock or other financial interests in mining concerns. Conversely, an agency might require certain employees to certify their understanding that 18 U.S.C. § 208 requires their disqualification from certain types of matters, and that they will comply with such disqualification requirements in performing their official duties. This latter type of certification may be an effective way of preventing conflicts of interest for special government employees assigned to work on discrete projects, without requiring the broad financial disclosure that so many of the general counsels feel is too burdensome in this context.

4. Finally, as you well know, the Ethics Act itself provides for special, more flexible, treatment for special government employees. See generally § 201(d) (exempting employees who serve sixty days or less from any public reporting requirement), and § 201(i) (giving the Director of the Office of Government Ethics authority to waive reporting requirements for special government employees under certain circumstances).

While implementation of this statute as we understand its requirements would undoubtedly impose some burdens, there are alternatives to a rigid, inflexible and broad application. However, in the final analysis, if our interpretation is wholly unacceptable and if the burdens are intolerably severe, you may wish to seek a legislative amendment to the Act so that the relevant provision would read "in such form as the President may determine provided that he may not require more information than is required by this title." 7/

7/ While the Department of Justice is unlikely to oppose such legislation in principle, you should be aware that such proposed legislation may meet with some resistance in the Congress. The House Report on the 1983 amendments to the

(Footnote continued on next page)

LEGAL DISCUSSION

We do not intend to repeat all of the arguments and debate that has ensued about the meaning of this provision. We will attempt merely to respond to some of the major points made by the March 2 Memorandum.

A. Language and Legislative History

The author of the March 2 Memorandum ignores the language of the statute on the ground that it is "ambiguous on its face" and proceeds immediately to an analysis of the legislative history without ever looking back to the statutory language. Moreover, the outcome of the author's journey through the legislative history appears influenced by a concentration on finding and presenting only one aspect of that history, that which the author believes lends support to the conclusion that the President should have complete discretion to establish any number of confidential disclosure systems so long as these systems do not exceed in their intrusiveness the public disclosure system established for high-level political appointees. We believe that this approach and conclusion are fundamentally flawed.

As a general matter, we cannot abandon the statutory language "in such form as is required by this title" in favor of an interpretation that is essentially incompatible with

(Footnote continued)

Ethics Act discusses the issue considered in the March 2 Memorandum and states that:

[T]he committee expects the President, in exercising the power provided in section 207 of the Act, will not reduce the scope or nature of the disclosure requirements. In fact, section 207 provides the President may require officers and employees to submit * * * reports in such form as is required by this title. That does not mean truncated or limited disclosure reports.

H.R. Rep. No. 89, Part. 2, 98th Cong., 1st Sess. 12 (1983) (emphasis added); see also *id.*, at 11 (citing the February 1983 Office of Legal Counsel Opinion).

that language. While we agree that legislative history and policy considerations are important and useful tools in interpreting statutes, they do not permit us to ignore the text of the statute unless Congress unequivocally has stated it intends a given word or phrase to have a specific meaning. See generally Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108 ("Absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive."). In this case we are aware of no such unequivocal statement of Congress, and we simply cannot reconcile the text of the statute with the position urged in the unsigned memorandum. Moreover, our review of the legislative history in its entirety leads us to conclude that Congress intended to impose the identical reporting obligations upon employees covered by the confidential and public disclosure systems.

At the risk of oversimplifying, the March 2 Memorandum observes that two discrete systems of confidential financial disclosure were recommended by the relevant Committees of the House of Representatives. 8/ The Post Office and Civil Service Committee recommended a confidential system for certain employees designated by the Director of the Office of Government Ethics, requiring the same information required on the public disclosure forms. Under this bill the Director

8/ See generally March 2 Memorandum at 3-23.

There were actually four different Committees of the House that considered and reported financial disclosure bills. See generally, 124 Cong. Rec. 30411 *et seq.* (discussing various provisions of the different committee bills at the time that a substitute bill (H.R. 13850) was taken to the floor). For our purposes, we need only focus on two of the committee bills.

The Senate Bill (S. 555) was silent on the subject of non-public disclosure by lower level employees. See discussion in March 2 Memorandum at 9-4. See also S. Rep. No. 170, 95th Cong., 1st Sess. 21-28, 42-46, 108-144; and 123 Cong. Rec. 21013-21019 (June 27, 1977). The Conference Report and the floor consideration of the Conference Report were similarly silent with respect to this point. See H. Cong. Rep. No. 1756, 95th Cong. 2d Sess. (1978); 124 Cong. Rec. 34526-34527, 36459-36469 (1978). Accordingly, the pertinent legislative history of Section 207(a) is derived from the House reports and floor debates.

also was given authority to relax by regulation specific reporting requirements applicable to employees filing public or confidential reports. (H.R. 6954). The Judiciary Committee recommended a system in which the President had broad discretion 1) to designate the employees who should file confidential reports and 2) to determine what information should be contained in such reports. (H.R. 1). This second element of discretion was recommended by the committee over objections to the effect that the bill would permit the President to impose overly intrusive and burdensome confidential disclosure requirements on lower level employees. See H.R. Rep. No. 800, 95th Cong., 1st Sess. 100 (1977).

A single compromise bill (H.R. 13850), in the nature of a substitute, was taken to the House floor. The substitute bill followed the form of the Judiciary Committee's H.R. 1 in many respects, but it also contained some new provisions which presumably answered the objections of dissenters and adopted positions recommended by the other interested committees. The limiting language of Section 207(a) concerning confidential reporting, "in such form as is required by this [title]," first appeared in the substitute bill presented on the House floor. Representative Schroeder, a supporter of the substitute and the Chairwoman of the Post Office and Civil Service subcommittee that reported H.R. 6954, explained this provision of the substitute as follows:

Seventh, there is provision for confidential filing by lower level personnel, but it must be done, as the Post Office and Civil Service Committee's bill required, according to the same form as public filings will be.

124 Cong. Rec. 30419 (1978). 9/ As noted previously, the Post Office and Civil Service Committee's bill required the same information on public and confidential reports.

As the March 2 Memorandum observes in detail, members of Congress did express sentiments, both in committee and on the floor, to the effect that the President should not be permitted

9/ Representative Schroeder made this remark in the context of "point[ing] out some of the good provisions of the substitute which came from the work of [the Post Office and Civil Service] committee as shown in H.R. 6954, Part I, the bill we reported and one of the three we have passed over for the substitute." 124 Cong. Rec. 30419 (1978).

to require more intrusive and burdensome disclosure in the confidential disclosure system than Congress had mandated for the public disclosure system. See March 2 Memorandum at 3-23. The March 2 Memorandum concludes that the most sensible reading of this legislative history is that Congress intended to place only an upper limit on the information that could be required of lower level officials in the confidential system. The deficiency in this conclusion is that while the language of the statute and its history support the view that such an upper limit was intended, they fail to support the proposition that no lower limit was intended. Standing alone or viewed as part of the entire history, the fact that some Members of Congress wanted to place a limit on the President's discretion to seek personal information from government employees supports only the conclusion, when coupled with the language ultimately adopted, that the confidential system could not be allowed to be more intrusive than the public system. It does not support the conclusion that the President was given discretion to collect less information in the confidential disclosure system than in the public system.

The legislative history in its entirety in fact reflects a desire for a system that would impose equal and reasonably uniform burdens on all employees required to file reports. Congress had decided what categories of information would be material in evaluating potential conflicts of interest and seemed to want to impose those requirements on some officials and leave to the President whether to impose essentially the same burdens on others. The March 2 Memorandum does not explain, indeed it does not even cite, the statement of Representative Schroeder relating the language of Section 207(a) in the substitute to the view of the Post Office and Civil Service Committee that there should be essentially the same disclosure requirements in the public and confidential systems. Our interpretation of the statute is compatible not only with the legislative history relied upon in the March 2 Memorandum, but also with the language of the enactment itself and the statement of Representative Schroeder concerning the views of her Committee and its role in the compromise that led to the enactment of Section 207(a) in its present form.

In addition to its argument based upon the legislative history, the March 2 Memorandum makes numerous other subsidiary arguments to support its conclusion. We will respond to those briefly.

The March 2 Memorandum's argument that Congress could have specifically referred to "the long-form disclosure requirement" if it wished to, especially since it did in

other cases, does not advance its conclusion since the same logic is even more true of the alternative interpretation of the statute. Congress surely would have said so if it intended to grant complete discretion to the President except as limited by the standard of the maximum amount and types of information required of the higher officials. Congress in fact set such a limit in Section 202(a) of the Act where it gave the Director of the Office of Government Ethics authority to require disclosure of gifts to dependent children "if the information required to be disclosed does not exceed that which must be reported by the spouse of a reporting individual under this title." Section 202(a) (emphasis added). The argument that Congress could have expressed itself more clearly had it intended a certain result is not particularly strong for either conclusion in the fact of this case, but it is more weighty in favor of the OLC conclusion in light of the linguistic awkwardness of reaching the alternative conclusion urged in the March 2 Memorandum.

The purpose behind a reporting system that seeks essentially the same categories of information from all reporting employees--a purpose that the March 2 Memorandum is entirely unable to discern--is apparently the goal of a comprehensive, uniform system. As unpleasant as it might be to fill out these forms, they seek only certain basic financial information such as sources and amounts of income, investments and liabilities, the sources and amounts of gifts and reimbursements, and the identity of financial affiliations. Although it is possible to disagree with the wisdom of the result, it is entirely reasonable for Congress to have assumed that these are precisely the categories of information that should be disclosed to avoid potential conflicts of interest by employees without imposing unjustifiable burdens on the privacy of those employees.

The March 2 Memorandum argues that its interpretation must be correct because it is the most "reasonable" in terms of its effect on the Executive Branch. The word "reasonable" in the context of the March 2 Memorandum is implicitly translated into "least burdensome" on the Executive Branch. While this would be a convenient theory upon which to predicate statutory interpretation, it ignores the language of the statute itself and overstates the significance of the judicial authorities upon which it relies. In most of the cases cited, a literal interpretation of the statute in question would have been nonsensical, entirely impracticable, or manifestly inconsistent with the legislative history. In matters of ethics, but in other areas as well, Congress has not been motivated strictly by the ease of application of the statutory requirements or

their convenience for the Executive. Here, for the reasons enumerated at the outset of this letter, the burden on the Executive, especially as perceived by the Congress, may not be as great as it has been portrayed by those anxious to avoid the requirement.

We certainly agree that this Administration has been committed to addressing and reducing unnecessary paperwork burdens and to reducing the oppressive force of such burdens on those who would work for or with the government. Sympathy with this policy, however, does not allow us to stretch legislative intent to suit those goals unless Congress has permitted such a range of options in the statute. Similarly, while Congress did intend a more flexible treatment for special government employees, it made specific provision for their situation in the Act itself. See discussion at 5, supra. These provisions can surely be used to mitigate some of the harsher aspects of the Act with respect to special government employees, but they are not an excuse to rewrite the Act itself--even if only with respect to such special government employees.

Finally, the March 2 Memorandum finds it "difficult to believe that Congress wished to exempt [certain officials] from the requirements [of the financial disclosure statute], but at the same time left the door open to imposition of the very same requirements through an executive order." In fact, Congress did this very thing, even under the analysis of the March 2 Memorandum. It left the "door open" to the President to impose the reporting requirements on employees not covered by the public disclosure system.

CONCLUSION

While it would certainly be preferable to read the statute in the manner suggested, we are unable to conclude that it is amenable to that interpretation. We have reviewed the statute and its legislative history repeatedly, but we cannot accept the tendered legal analysis, irrespective of the lack of popularity of our conclusions. The statute requires that any general system of financial reporting imposed by the President require the same information as is required in the public reporting system established by the Act.

Sincerely,

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

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United States Senate

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March 21, 1985

The Honorable Edwin Meese, III
 Attorney General of the United States
 Department of Justice
 Constitution Avenue and Tenth Street, N.W.
 Washington, D.C. 20530

Dear Mr. Attorney General:

The Senate Subcommittee on Oversight of Government Management will hold an oversight hearing on the Office of Government Ethics on Tuesday, April 2. The hearing will focus on the OGE's performance of its duties under Title IV of the Ethics in Government Act of 1978. The Subcommittee will also examine the implementation of the post-employment conflict-of-interest provisions of the Ethics Act and the status of the confidential financial disclosure system. The hearing will begin at 9:30 a.m. in room 366 of the Dirksen Senate Office Building.

I ask that the appropriate official of the Department of Justice appear before the Subcommittee to address the Department's views on the confidential financial disclosure system and the enforcement of the "revolving door" provisions of the Ethics Act. Specifically, I ask that the testimony discuss the following issues:

- (1) What are the Department's views on the legal authority for and enforceability of confidential financial disclosure filing requirements in Executive Branch agencies? Please discuss any opinions that the Department has rendered to federal agencies concerning the confidential financial disclosure system.
- (2) What is the current status of the confidential financial disclosure system within the Department of Justice? Are Department employees filing confidential financial disclosure forms?

The Honorable Edwin Meese, III
March 21, 1985
Page Two

- (3) How many prosecutions have been brought by the Department of Justice against Executive Branch officials or employees for alleged violations of 18 U.S.C. §207, the post-employment conflict-of-interest provisions, since 1980? Please briefly describe the facts and outcome of each case.
- (4) How many alleged violations of 18 U.S.C. §207 have been referred to the Department since 1980 but did not result in prosecution?

In order to allow adequate time for questions from the Subcommittee members, I request that the Department's witness summarize the written testimony for oral presentation. Three copies of the written statement should be delivered to the Subcommittee on Oversight of Government Management, room 326 of the Dirksen Senate Office Building, by close of business on Friday, March 29. I also ask that the Department provide the Subcommittee with 50 additional copies of its statement on April 1, the day before the hearing.

Thank you for your assistance to the Subcommittee. If you have any questions, please have your staff contact Mary Gerwin or Susan Collins of the Subcommittee staff at 224-5538.

Sincerely,



William S. Cohen
Chairman

WSC:mbg



U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 28 1985

MAR 27

Honorable William S. Cohen
Chairman
Subcommittee on Oversight of
Government Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter responds to your March 21, 1985 request to the Attorney General that the Department of Justice respond to several questions you have posed in anticipation of an oversight hearing on the Office of Government Ethics on April 2, 1985. Our responses to these questions are provided below.

I.

What are the Department's views on the legal authority for and enforceability of confidential financial disclosure filing requirements in executive branch agencies? Please discuss any opinions that the Department has rendered to federal agencies concerning the confidential financial disclosure system.

It is the view of the Department of Justice, as expressed in memoranda by the Office of Legal Counsel, that title II of the Ethics in Government Act of 1978 (the Act) superseded any general statutory or nonstatutory financial disclosure reporting systems in effect prior to the Act. This view is derived from section 207(c) of the Act, which provides in relevant part:

The provisions of this title requiring the reporting of information shall supersede any general requirement under any other provision of law or regulation with respect to the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest.

Based on this language and relevant legislative history, the Department has concluded that the confidential reporting system for Executive Branch officials established by Executive Order No. 11222 was superseded by the Ethics in Government Act. Pursuant to title II of the Act, however, "[t]he President may require officers and employees in the executive branch . . . not covered by this title to submit confidential reports in such form as is required by this title." See 5 U.S.C. App. § 207(a). It has therefore been our view that a confidential reporting system for the Executive Branch may be established by a new Executive Order or other presidential directive.

II.

What is the current status of the confidential financial disclosure system within the Department of Justice? Are Department employees filing confidential financial disclosure forms?

In December 1983, the Office of Legal Counsel informed the Department's Designated Agency Ethics Official that confidential financial statements should not be collected unless a new reporting system is prescribed by the President. Since then, the Department has not mandated the collection of confidential disclosure statements from its employees.

III.

How many prosecutions have been brought by the Department of Justice against Executive Branch officials or employees for alleged violations of 18 U.S.C. § 207, the post-employment conflict-of-interest provisions, since 1980? Please briefly describe the facts and outcome of each case.

The Public Integrity Section of the Criminal Division has prosecuted two section 207 matters administratively under 18 U.S.C. § 207(j) and 28 C.F.R. § 45.735-7a. The Section has brought no criminal prosecutions under section 207 in the period of interest to the Subcommittee.

The first 207(j) prosecution was brought in 1983 against a former Assistant United States Attorney who represented a federal parolee before U.S. Parole Commission officials in a parole revocation proceeding. This proceeding was related to

a prosecution of the parolee which the former AUSA had handled as an AUSA. The Assistant Attorney General of the Criminal Division sent the former AUSA a letter of admonishment.

The second 207(j) prosecution was brought in 1984 against a former United States Attorney who, within a year of his resignation from federal service, communicated on behalf of a client with officials from the office that he had headed as United States Attorney. The Assistant Attorney General of the Criminal Division sent the former United States Attorney a letter of admonishment. #/

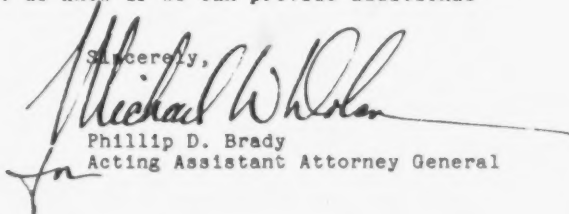
IV.

How many alleged violations of 18 U.S.C. § 207 have been referred to the Department since 1980 but did not result in prosecution?

Fifty-one matters involving 18 U.S.C. § 207 were referred to the Public Integrity Section in the period of interest to the Subcommittee. These include the two section 207(j) matters outlined above. As of the end of February 1985, seven matters involving section 207 were open in the Public Integrity Section. The remainder were closed without criminal prosecution.

While the Department is submitting this letter in lieu of testimony, please let us know if we can provide additional assistance.

Sincerely,


Phillip D. Brady
Acting Assistant Attorney General

#/ The information supplied in response to items 3 and 4 of the Subcommittee's request is based on records of the Public Integrity Section of the Criminal Division. Section 207 is also enforced by the 93 United States Attorneys Offices. In order to provide more complete information, we have asked the Information Services Staff of the Executive Office for United States Attorneys to provide material in response to items 3 and 4 of the Subcommittee's request. This information may be retrievable by fiscal year only. The information supplied by the Information Services staff will be forwarded as soon as it is available.

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December 14, 1983

The Honorable David Martin
 Director
 Office of Government Ethics
 1717 H Street, N.W.
 Room 436
 Washington, D.C.

Dear Mr. Martin:

In passing legislation to reauthorize the Office of Government Ethics, the Congress reaffirmed its strong commitment to the principles of financial disclosure and a strong ethics program in the Executive Branch. I am writing to request your recommendations concerning a matter that I believe is crucial to an effective Executive Branch ethics program: the confidential financial disclosure system.

Section 207(a) of the Ethics in Government Act authorizes the President to require Executive Branch personnel who are not subject to the public financial disclosure requirements of the Ethics Act to submit confidential financial disclosure reports. As you know, it has been the longstanding practice of many agencies to require certain employees to file such confidential reports with the agency ethics offices.

I am concerned that recent interpretations of the Ethics Act by the Department of Justice may place in question the enforceability of the confidential financial disclosure system. Specifically, in a February 10, 1983 memorandum to your office, the Office of Legal Policy of the Department of Justice interpreted section 207(a) of the Ethics Act as requiring confidential financial disclosure reports to include the same information required in public financial disclosure reports under Title II of the Act. Additionally, that memorandum reaffirmed an earlier opinion of the Department that the Ethics Act superseded the confidential financial disclosure system which existed prior to the adoption of the Ethics Act.

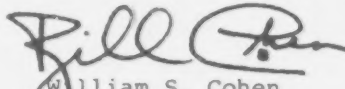
The Honorable David Martin
Director
Office of Government Ethics
December 9, 1983
Page Two

While I believe that the Congress, in passing the Ethics Act, did not intend to eliminate the confidential financial disclosure requirements of individual agencies, I am concerned that the Department of Justice's opinions may undermine the enforcement of the confidential filing system. It has come to my attention, for example, that some Executive Branch employees have questioned their responsibilities to comply with the confidential filing requirements in light of the Department of Justice's opinions. Moreover, agency ethics officials should be provided with clear legal authority to enforce these requirements.

Because the Department of Justice's opinion was issued almost one year ago, I believe that swift action must be taken, either administratively or legislatively, to correct this problem. Accordingly, I ask that you provide me with the recommendations of the Office of Government Ethics on the relative merits of the options available to address this problem, as well as any actions that your office is now taking in this area. If you have any questions, please contact Mary Gerwin or Susan Collins of my staff at 224-5538.

Thank you for your cooperation in this matter. I look forward to working with you to correct this problem as soon as possible in order to ensure the integrity of the confidential financial disclosure system.

Sincerely,


William S. Cohen
Chairman

WSC:mbg

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

APR 19 1985

Honorable William S. Cohen
United States Senate
322 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Cohen:

This is in response to your letter of December 13, 1984, and my subsequent conversations with Mary Gerwin of your staff regarding the executive branch confidential reporting system.

In February of 1983, the Office of Legal Counsel of the Department of Justice concluded in a memorandum that an executive branch confidential reporting system must contain the same information as currently required in the publicly filed financial disclosure report (SF 278). In May of 1983, the Office of Government Ethics proposed amending Executive Order No. 11222 to implement the decision of the Department of Justice. The proposed amendment was circulated for comment within the executive branch. There was an extensive negative reaction to the proposal based on the perceived burdensome requirements of extensive reporting and reviewing over 100,000 confidential reports. Moreover, various departments and agencies contend that they would be unable to secure consultants, part-time employees with essential expertise, and others if they were required to complete the SF 278. Obviously, they preferred to continue the existing reporting system.

When I arrived in July 1983, this was one of the issues presented to me. After several meetings and unsuccessful attempts to administratively accommodate the various interests under the Department of Justice decision, it was decided to present a more expanded argument to the Department of Justice and request their review and reconsideration. This was done, however, the Department of Justice confirmed their earlier position in a memorandum to me, dated June 21, 1984.

Thereafter, it was my view that the executive branch must amend Executive Order No. 11222 and/or seek legislation amending the Ethics in Government Act to authorize a confidential reporting system which could require less information than that required of public filers. It was also my view that a grace period was appropriate in which the executive branch could decide what course it preferred to take. The preference of this Office was to seek legislation. After much discussion and deliberation, we drafted proposed legislation which would amend the Ethics in Government Act in a number of ways, including a proposal on confidential reporting. There was insufficient support for these proposals, and it was finally decided that since legislation on the confidential system was essential, we should go forward with that proposal. I, therefore, proposed a simple bill to authorize this Office to implement a confidential system which would satisfy the needs of the executive branch, yet maintain an adequate review of financial holdings for confidential filers. That legislation is now being reviewed in the Office of Management and Budget. I am optimistic that this legislation will be forwarded for your consideration in the very near future.

If you have any further questions regarding this most serious matter, please contact me.

Sincerely,

David H. Martin
David H. Martin
Director

* Subcommittee note: Date of Senator Cohen's letter is December 14, 1983.

BUREAUCRATIC ORPHANS:
The Administration of Government Ethics Programs
as Viewed by Agency Ethics Officials

NOVEMBER 1984



COMMON CAUSE

ACKNOWLEDGMENTS

Common Cause would like to thank all those agency ethics officials who took the time to respond to our questionnaire and share their views and experiences with us. We are also grateful to ethics officials Saul Katz (General Services Administration), Gabriele Paone (Department of the Interior), Myrna Selgel (Securities and Exchange Commission) and Gerald Yamada (Environmental Protection Agency) for their input and ideas at the early stages of this work.

This study was prepared by Janet Leno, Senior Research Associate of the Issue Development staff, with assistance from Michal Freedman, Associate Director for Issue Development, and under the supervision of Stephen Hitchner, Jr., Vice President for Issue Development.

EXECUTIVE SUMMARY

In recent months numerous questions about the integrity of federal officials have been brought to the attention of the American public. Allegations of use of public office for private gain, acceptance of gifts, and incomplete reporting of financial holdings have become all too frequent.

In the midst of this growing public concern about government officials' conduct, Common Cause has undertaken an exploratory study of how ethics programs are administered within the federal Executive branch. We have focused on those individuals with direct responsibility for providing ethics education and preventing financial conflicts of interest -- the "designated agency ethics officials," or DAEOs.

The findings of the study are based on responses to a questionnaire completed by DAEOs from fifty agencies including those as diverse as the Department of Commerce and the President's Council on Environmental Quality. (For a complete list of agencies responding, please see Appendix A.) Although the DAEOs' views and self-evaluations reflect only part of the picture, they provide a useful starting point for understanding and evaluating the efforts being made to ensure that ethical standards are being upheld by government officials.

The study found great variance among agencies in the provision of ethics-related services. Although the DAEOs' reports suggest that a number of agencies provide valuable training and education and perform systematic review of financial

disclosure reports in the face of serious resource constraints, Common Cause has found a number of areas of concern:

- o Great variance exists among agencies in their commitment to providing ethics-related services.
- o Agency ethics officials tend to view their ethics duties narrowly, focusing mainly on financial reporting requirements and paying less attention to ethics education.
- o In most agencies the visibility of ethics programs is low. They do not have a separate identity, but tend to be operated as an adjunct to the office of general counsel or personnel.

Data from the study also indicate that:

- o Most designated agency ethics officials spend less than 15 percent of their time on ethics responsibilities.
- o Although some agencies appear to operate reasonably good systems for the collection and filing of financial disclosure forms, the process by which ethics officials make determinations of financial conflicts of interest is often ad hoc rather than systematic.
- o Monitoring of compliance with post-employment restrictions tends to be limited or non-existent in many agencies, although DAEs identified post-employment conflicts frequently as an important ethics problem.
- o Many DAEs do not maintain a record of situations that have resulted in noncompliance with ethics laws and regulations, as required by the Ethics in Government Act.
- o Communication between ethics officials and offices of Inspectors General appears to be weak in most agencies.

DAEs report general satisfaction regarding their relationship with the Office of Government Ethics and the services they receive from OGE. OGE's high marks for its responsiveness to DAEs, however, reflect only one part of that office's set of responsibilities. The evaluation by DAEs does not and cannot address larger issues such as OGE's overall effectiveness in monitoring the Executive branch ethics program, its judgment in

cases involving charges against high level officials, its degree of initiative, or the strength of its leadership within the administration.

The areas of concern we have identified appear to flow from insufficient commitment from high-level officials, both in the White House and in the agencies. This results in low visibility for many ethics programs, which hinders their effectiveness. If DAEs are to succeed in their efforts to educate employees about their ethical obligations and to prevent conflicts of interest, greater support and direction from the top are essential.

The study also suggests a number of other recommendations. Among these are the following:

- o Enabling DAEs to spend a greater amount of time on ethics responsibilities to improve the quality of ethics programs and increase their identity and independence within the agencies;
- o Strengthening regular ethics training on the broad range of standards of conduct issues and improving the quality of written material used by DAEs for ethics education;
- o Making the review of financial disclosure forms and procedures for determining conflicts of interest more systematic in order to reduce the potential for financial conflicts;
- o Increasing monitoring of compliance with post-employment restrictions; and
- o Enabling the Office of Government Ethics to provide more training sessions for agency ethics officials and to conduct more audits of agency ethics programs.

Data from this preliminary study have begun to answer some questions about how ethics programs are being implemented by agency ethics officials. Further investigation into agency employees' perceptions of how ethics programs are being implemented would provide an important supplement to the picture painted by the DAEs. The study also suggests that evaluation of OGE activities and resources could produce information that would be useful to the public and to Congress as well as OGE in planning for its future activities and staff needs.

Where government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government. Each individual officer, employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.

-- Executive Order 11222, Part I

I. INTRODUCTION

By the very nature of their employment, federal officials and employees of the Executive branch must meet high standards of conduct. If they do not, public confidence in government will be jeopardized and broad-based support for public programs and policies will be diminished. Further, high standards of conduct must be maintained if government is to operate efficiently, helping to ensure that public funds are expended for public purposes.

The Watergate scandal in the early 1970s heightened public concern about the integrity of government officials and employees. Laws and regulations passed in the wake of Watergate have worked as important safeguards to protect the public, but instances of improper conduct have continued to mar every recent administration. The present administration has had particular problems in this regard. Many examples of improper or questionable behavior have been reported by the press in the past three years, including an attorney general who invested in questionable tax shelters; a deputy secretary at the Commerce Department who negotiated for employment with an outside company while carrying on government business with that company; an agency head who

bilied the government for travel expenses paid for by business and trade associations; and an Environmental Protection Agency official convicted of having committed perjury in sworn congressional testimony concerning granting favors to her former employer.

These are only a few of the many questions that have been raised recently about the conduct of public officials, both political appointees and career civil servants. Although Common Cause believes the ethics laws are fair and balanced, they are not self-enforcing. Much more needs to be done to ensure that the safeguards really work. The problem is a serious one that requires priority attention from the President and Congress -- and from the American people.

Standards of Conduct for Public Officials

A variety of laws and regulations prescribe appropriate conduct for federal employees. These include:

(1) Executive Order 11222, signed by President Lyndon B. Johnson in 1965, prescribes standards of conduct and authorizes agencies to issue regulations to implement its provisions. The Executive Order addresses the following types of circumstances:

- o accepting gifts, gratuities, favors, entertainment, loans, or anything of monetary value;
- o avoiding any action that might result in, or appear to result in, using public office for private gain;
- o giving preferential treatment to any person or organization;
- o impeding government efficiency or economy;

- o losing complete independence or impartiality of action;
- o making a government decision outside official channels; or
- o damaging public confidence in the integrity of government.

The Executive Order also addresses the issues of:

- o outside employment;
- o use of federal property and official information; and
- o confidential financial reporting for certain employees classified below GS-16 level.

(2) The Ethics in Government Act of 1978 builds upon the requirement established in Executive Order 11222 concerning the disclosure of financial holdings. It provides for:

- o public financial reporting requirements for all executive branch employees classified at the GS-16 pay level and above;
- o uniform financial reporting requirements for high-level officials in all three branches of government; and
- o additional restrictions on post-Federal employment, often referred to as the "revolving door" problem.

The Act also established the Office of Government Ethics (OGE) within the Office of Personnel Management. The director of OGE is charged with developing rules and regulations regarding the identification and resolution of conflicts of interest, and monitoring and investigating compliance with financial disclosure requirements, as well as "providing information on and promoting understanding of ethical standards in executive agencies."

(3) Criminal penalties apply for violations of 18 USC §§201-209. These sections of the criminal code, enacted in their present form in 1962, pertain to bribery, graft and conflicts of interest. Four key categories set forth restrictions on post-

Federal employment, outside income, financial holdings, and outside activities in matters involving the United States.

(4) Many other laws governing standards of conduct and financial disclosure in individual agencies relate to the specific activities of the personnel in those agencies.

The Administration of Ethics Programs

The laws and regulations outlined above will be effective only to the extent that (1) federal employees know what is expected of them; (2) compliance with those laws is monitored; and (3) employees are held accountable for violations of the standards. In our view, an effective agency ethics program should include seven basic elements:

- o Establishing adequate standards of conduct regulations to address problems specific to individual agencies;
- o Educating all agency employees about the laws, regulations and guidelines that have been established to govern their conduct in office;
- o Providing ethics counseling for individual employees who are in doubt about restrictions pertaining to their particular circumstances;
- o Maintaining systems to ensure that financial disclosure statements, and any other ethics reports required by law or regulation, are completed fully and accurately and filed on a timely basis;
- o Reviewing the financial statements, conducting random audits and otherwise monitoring the activities of individuals subject to ethics laws and regulations to identify possible violations of the required standards of conduct;
- o Investigating, or referring to other appropriate authorities for investigation, all possible violations that are identified; and

- o In those cases where violations are determined to have taken place, ensuring that appropriate administrative, civil or criminal sanctions are imposed.

Under the Ethics in Government Act of 1978, responsibility for the administration of ethics programs in the Executive branch is shared by the Office of Government Ethics and the heads of individual agencies. The OGE is charged with providing overall direction and leadership concerning executive branch policies related to preventing conflicts of interest." Regulations specify that OGE would carry out its leadership role by:

(1) Providing information on and promoting ethical standards in executive agencies;

(2) Consulting with agencies regarding their agency ethics programs and assisting them in interpreting ethics rules and regulations;

(3) Developing rules and regulations pertaining to conflicts of interests and standards of conduct;

(4) Monitoring compliance with the public and confidential financial disclosure requirements;

(5) Establishing a formal advisory opinion service; and

(6) Evaluating the effectiveness of programs designed to prevent conflict of interest. [5 CFR §738.102]

Within each agency, responsibility for ethics matters is vested in the agency head. Regulations implementing the Act specify that "[t]he head of each agency is responsible for and shall exercise personal leadership in establishing, maintaining, and carrying out the agency's ethics program." [5 CFR §738.202(a)] The regulations further provide that each agency head appoint a "designated agency ethics official", or DAE0, to coordinate and manage the agency's ethics program. Since agency heads are charged with an enormous number of responsibilities,

Congress clearly envisioned that in practice the DAEOs -- of whom there are more than 100 throughout the Executive branch -- would play the key operational role in developing and administering the ethics program in their respective agencies. As set forth by regulations implementing the Ethics in Government Act, first-line responsibility for enforcing the ethics laws rests squarely with the DAEOs.

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This study was undertaken by Common Cause as an exploratory effort to examine the quality of agency ethics programs. In light of the critical role played by the DAEOs in this regard, and the limited attention their activities have received to date, we wanted to find out what they are doing and how they are doing it. Our study focused first on the substance of ethics education: what information is being communicated, in what manner, and to which employees? Second, what steps are agencies taking to ensure that employees are free from financial conflicts of interest? In particular we were interested in the procedures used in different agencies to prevent conflicts.

The study's findings are based on reports from agency ethics officials. Although these self-evaluations reflect only part of the picture, they provide a useful starting point for understanding and evaluating the efforts agencies are making in the areas of ethics education and monitoring financial reports.

At the same time, we are aware that perceptions about the quality of agency ethics programs vary, depending on one's organizational perspective. Although agency ethics officials

often report that their programs are highly successful, recipients of their services or detached observers may not agree. The contrast between generally favorable DAEO self-assessments and reports by certain governmental employees interviewed recently by the House Committee on Post Office and Civil Service, Subcommittee on Human Resources illustrates this discrepancy.

After talking to over two-hundred high level federal employees in connection with investigations regarding the transfer of President Carter's 1980 campaign briefing materials to the Reagan campaign, the subcommittee

. . . found that no general ethics briefings for federal officials are required. Most current and former government employees questioned during the investigation had not been briefed on the standards of conduct that cover employees' responsibilities toward use of federal property, non-public information, and other legal responsibilities. We also found that there is no general system for determining how these standards have actually been applied.*/

Findings

Responses to our questionnaire from fifty DAEOs suggest wide variation in the provision of ethics-related services among agencies. While ethics officials in some agencies are inventive and energetic in carrying out their duties to educate employees on standards of conduct and to comply with financial reporting requirements, others provide far less service and guidance on ethics matters.

*/ Opening statement by Chairman Albosta, Subcommittee on Human Resources, Committee on the Post Office and Civil Service -- Hearing on H.R. 5719, Amendments to the Ethics in Government Act, June 19, 1984.

Nearly all agency ethics programs, however, face serious resource constraints. Insufficient staff time in many agencies means insufficient educational and oversight efforts and generally low visibility of ethics programs. Designated Agency Ethics Officials, who are most often general counsels or high level officials in the general counsel's office, frequently have many other functions in addition to their ethics responsibilities. As a result, they often focus their limited attention on financial disclosure reporting requirements, thereby neglecting their broader ethics education and training responsibilities. These weaknesses could be corrected by a modest number of additional ethics staff.^{*}/ In particular, data from the study also indicate that:

- o Most designated agency ethics officials spend less than 15 percent of their time on ethics responsibilities. (pp. 14-15)
- o Although some agencies appear to operate reasonably good systems for the collection and filing of financial disclosure forms, the process by which ethics officials make determinations of financial conflicts of interest is often ad hoc rather than systematic. (pp. 26-28)
- o Monitoring of compliance with post-employment restrictions tends to be limited or non-existent in many agencies, although post-employment conflicts were frequently identified as an important ethics problem. (pp. 30-31)
- o Many DAEOs do not maintain a record of situations that have resulted in noncompliance with ethics laws, as required by the Ethics in Government Act. (p. 34)

^{*}/ For example, in large departments we believe there should be one full-time person to monitor ethics programs in the various sub-agencies and to work with ethics officials in those units to set up quality ethics programs.

- o Communication between ethics officials and offices of Inspectors General appears to be weak in most agencies. (pp. 38-39)

Further, the Common Cause study found that:

- o Agency ethics officials indicate that they are generally satisfied with the services they receive from the Office of Government Ethics. They did, however, suggest a number of areas in which OGE could improve its services (pp. 16-18)
- o The vast majority of respondent agencies report that they provide some form of ethics training or education on general standards of conduct, although the quality varies among them. (pp. 18-20)
- o Similarly, most agencies disseminate written materials that explain these standards, but in our opinion their usefulness differs significantly among agencies. (pp. 20-22)

At the same time that responses to our questionnaire demonstrate weaknesses in the implementation of agency ethics programs, there are also data to suggest that some innovative, and we hope effective, ethics program approaches are also being employed. A number of these are cited throughout the body of this report. In addition, through a review of documents provided by all DAEOS to the House Committee on the Post Office and Civil Service, Subcommittee on Human Resources, Common Cause has found other examples of particularly interesting procedures and services. They serve as evidence that ethics program requirements can be achieved.

- o Former employees of the Defense Contract Audit Agency receive assistance from ethics staff in complying with post-employment restrictions. This agency also collects and evaluates employment information on certain former employees and attempts to locate and remind ex-employees of their obligations regarding post-employment restrictions.

- o At the Defense Intelligence Agency all IG inspections include attention to potential violations of financial holding requirements.
- o The head of each directorate or separate office at the Defense Nuclear Agency must certify annually to the General Counsel's office that subordinate personnel have reviewed the standards of conduct and are aware of their personal responsibility.
- o Labor relations contracts at the U.S. Customs Service require employees to know and adhere to the standards of conduct.
- o At Action the DAEO attempts to prevent conflicts of interest by submitting to the Grants and Contracts office the names of organizations with which employees are associated. These are then checked by Grants and Contracts officers before any grants or contracts are awarded. Comparisons are also made between confidential statements of financial interests and a list of current agency grants and conflicts.
- o The DAEO at the Environmental Protection Agency has requested that agency's IG to conduct annual audits in at least one headquarters and one regional office to check on compliance with standard operating procedures and evaluate decisions made by Deputy Ethics Counselors.
- o Terminating employees at the International Trade Commission are required to formally check out with the agency ethics counselor prior to leaving. Restrictions on post-employment activities are discussed at that time.
- o At the Merit Systems Protection Board supervisors discuss post-employment restrictions with all departing employees. The DAEO at this agency is also developing a regular ethics feature for the employee newsletter to serve as a reminder of overall ethics requirements as well as to educate employees on particular matters.
- o NASA newsletters include regular reminders of post-employment restrictions.
- o At the National Science Foundation the Office of Audit and Oversight monthly checks all proposal files for involvement by incoming professional employees at or above the GS-12 level and by all such former employees for a year after they leave NSF. Checks are also made of all rotators and Intergovernmental Personnel Act participants.
- o The Nuclear Regulatory Commission attempts to prevent financial conflicts of interest by sending a list of prohibited stocks and a copy of the ethics regulations to

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all prospective employees at the time the job offer is made.

- o Along similar lines, the Postal Rate Commission's Ethics Counselor distributes annually guidelines concerning investments along with financial disclosure forms.
- o At the Securities and Exchange Commission all former employees are required to notify the Commission's Secretary for two years after leaving each time they appear before the Commission, stating the nature of representation and affirming that it is consistent with post-employment restrictions.

* * *

Although appropriately staffed, vigorous, high-profile ethics programs are a critical first step to minimize abuse of ethical standards, this alone will not be enough. What is needed also is commitment to the spirit, as well as the letter, of the ethics laws now in place. High level administration officials must be strong advocates for high standards of ethical conduct. Without a clear message from the top that compliance with ethics laws is a priority, agency ethics programs will not receive the resources, direction or support they need and thus will be unable to carry out their important mission.

This point was underlined recently in testimony presented by the DAEO from the Department of Health and Human Services before the House Subcommittee on Human Resources of the Committee on the Post Office and Civil Service. In this DAEO's view:

. . . an agency's ethics program must be grounded in the strong and visible support of the head of the agency and the senior manager of that agency. If standards of ethical conduct are recognized and taken seriously by senior managers, and that concern is communicated to their subordinates, the work of an ethics officer is made immensely easier and the ethics program is much more likely to be effective. On the other hand, if matters relating to ethics are viewed as an administrative bother or made light of by senior

managers, the ethics official has an uphill struggle. No amount of training, orientation, development of written material, or counseling arrangements can overcome reluctance by those in charge of an agency to take ethics seriously.*/

The following sections describe how the key components that comprise agency ethics programs are being implemented in fifty agencies. In addition to providing a broad-brush picture, we have tried to highlight various ethics-related education and training techniques and procedures currently in use in one or more agencies that appear to be particularly effective.

Method of Study

Data for this study were derived from responses to questionnaires and a small number of personal interviews. Questions were drawn from materials produced by OGE, regulations implementing the Ethics in Government Act, and Executive Order 11222.

Questionnaires were mailed to Designated Agency Ethics Officials or their deputies in ninety-one federal departments, agencies and commissions. These were selected from a complete list of 125 ethics officials compiled by OGE. Particularly small agencies were not included in the sample.

Of the ninety-one questionnaires mailed in early January 1984, fifty (54 percent) were completed and returned to Common Cause. These included ten major departments and agencies.

*/ Statement of Daniel J. Grinstead, June 19, 1984.

II. ANALYSIS OF QUESTIONNAIRE RESPONSES

The following sections present the results of our survey of agency ethics officials. A copy of the questionnaire is attached (see Appendix C).

Designated Agency Ethics Officials -- Who They Are

As indicated earlier, the Designated Agency Ethics Official, or DAE0, is the individual in each Executive branch agency who is operationally responsible for establishing and administering that agency's ethics program. The specific duties of each DAE0, as prescribed by regulation [5 CFR §738.203], include:

- o Developing and maintaining liaison with the Office of Government Ethics;
- o Establishing and administering a system for the filing and review of financial disclosure reports;
- o Developing and conducting an education program for agency employees concerning ethics and standards of conduct;
- o Developing and conducting a counseling program for agency employees on ethics and standards of conduct;
- o Taking action to remedy all violations or potential violations, or appearances thereof, of the agency's standards of conduct or of other laws and regulations governing the conduct or financial holdings of agency personnel.

Since DAE0s play such a key role in implementing agency ethics programs, it is important to know the qualifications of the individuals who have been selected as DAE0s and the amount of time they devote to their ethics responsibilities. With regard to their qualifications, our survey results show that the vast majority of DAE0s are either general counsels or high-level staff

In the general counsel's office. In a few cases the DAEO is located in the office of personnel. At the General Services Administration the DAEO is situated in the office of the administrator. Nearly all DAEOs have professional backgrounds in law, and a few are professionally trained in administration or personnel management.

In most of our respondent agencies, the DAEO has had responsibility for ethics for two years or more. A small number have worked in this capacity for less than one year, and an even smaller number have been DAEOs between one and two years.

All but four of the DAEOs in the survey report that they have received training pertaining to standards of conduct restrictions, financial conflict of interest, and the provisions of the Ethics in Government Act. Thirty-nine of those trained took advantage of conferences and seminars conducted by the Office of Government Ethics. Seventeen received in-house training, and twelve have relied either on sessions held by the National Center for Administrative Justice or on-the-job training.

As intended by Congress in its creation of OGE and the agency ethics programs, DAEOs tend to be relatively senior employees within their agencies. Of those who responded to a question on this subject, nine DAEOs hold Executive Level positions, twenty-two are part of the Senior Executive Service, five hold positions between the GS/GM-16 and 18 range, nine are GS/GM-15s, one is a GS-14, one a DS13-10 and one is a M-12.

In most agencies, DAEOs tend to have a large number of responsibilities in addition to their ethics duties. In twenty-

four of the agencies in our sample, DAEs report that they spend less than 5 percent of their time on ethics. Fourteen report they spend between 6 and 15 percent of their time on these responsibilities, and two others report that between 16 and 25 percent of their time is devoted to ethics. In only five cases do DAEs report that ethics responsibilities claim between 26 and 50 percent of their time, and in four others the DAE devotes over 50 percent of his or her time to ethics. Although many DAEs delegate a great deal of responsibility for managing ethics programs to subordinates, it is nonetheless striking that so many of them devote so little time to these duties.

In the majority of cases in our sample, DAEs have fewer than 10 staff members assisting them on ethics issues in their Washington offices. These staff include attorneys and personnel specialists who serve as ethics counselors. In eight large agencies, DAEs rely on between 11 and 40 staff to help with ethics functions.

In the regions, twenty-six agencies report that they have no ethics staff, and seven have fewer than ten employees working on ethics. At regional offices in seven agencies there are between 11 and 50 ethics staff, at three there are between 51 and 250, and at one agency there are between 251 and 300 regional staff with some ethics responsibilities. Like the DAEs, these people tend to devote a relatively small portion of their time (less than 10 percent in most cases) to ethics. Also like the DAEs, most regional staff are trained as lawyers, less often as

personnel or administration specialists. Occasionally bank examiners or audit evaluators serve as regional ethics staff.

Relationship with OGE

Regulations implementing the Ethics in Government Act also require DAEs to develop and maintain "close liaison" with the Office of Government Ethics [5 C.F.R. §738.203(b)(1)]. Respondents to our survey have a very positive view of the role being performed by the Office of Government Ethics, considering it to be both responsive and helpful. They did, however, suggest a number of areas in which OGE could do things it is not doing at present.

Nine of the agencies that responded contact OGE weekly, six other agencies say they do so once every two weeks, and thirteen report contacting OGE once every three or four weeks. The largest number of agencies, twenty, report being in touch with OGE less frequently.

Thirty-eight DAEs in our survey indicated that they rely on OGE for the provision of both routine information and non-routine, problem-oriented responses to their inquiries. Seven agencies use OGE only for assistance on problem-oriented questions, and four use OGE services for routine information only.

Forty-one of our respondents consider their contact with OGE regarding general ethics information to be "very useful," and eight others rank it as "useful." Regarding information provided in response to questions on specific ethics situations or problems, thirty-eight agencies find contact with OGE to be "very

useful" and eleven consider this service "useful." Overall, thirty-seven agencies rate OGE's performance as "very effective," and eleven consider it to be "effective."*/

When asked what services they would like OGE to provide that it does not now provide, twenty-two respondents noted the dissemination of a "how-to" handbook on DAE0 duties. Three respondents suggested that OGE conduct more frequent audits of agency ethics programs.

A number of other ideas included the following: publication and distribution of formal advisory opinions in complete (not digest) form; more training; less emphasis on financial statement review; stronger advocacy for ethics programs within the agencies; films and speakers for agency-wide audiences; promulgation of regulations clarifying the meaning of "negotiating for employment"; publication of case studies; development of a computer system to determine corporate subsidiaries and affiliates; and promulgation of government-wide regulations on the acceptance of gifts, transportation, meals, and lodging.

Other suggestions included periodic meetings between OGE and all DAE0s, greater efforts to improve service by OGE to persuade the Department of Justice to prosecute referrals under 18 U.S.C. §§203-209, and occasional distribution of newsletters by OGE. As

*/ OGE's high marks for its responsiveness to DAE0s, however, reflect only one part of that office's set of responsibilities. The evaluation by DAE0s does not and cannot address larger issues such as OGE's overall effectiveness in monitoring the Executive branch ethics program, its judgment in cases involving charges against high level officials, its degree of initiative, or the strength of its leadership within the administration.

of May 1984, OGE has begin to publish its Ethics Newsgram, a four-page publication focusing on ethics news and information with agency-wide applicability. OGE intends to issue the Newsgram at least quarterly.

Ethics Training and Education

One of the principal duties of each DAEO, described earlier, is to ensure that "an education program for agency employees concerning all ethics and standards of conduct matters, including post employment matters, is developed and conducted in cooperation with the education program of the Office of Government Ethics." [5 CFR §738.203(b)(6)] Unless government employees know and understand the standards of conduct, they cannot be expected to comply with them. Our questions regarding agency ethics training and education programs focused on the broad area of standards of conduct applicable to all federal employees as well as on the financial disclosure and post-employment restrictions that apply to certain high-level employees.

Efforts to educate and train employees about ethics vary widely among agencies. These range from minimal ad hoc activities, particularly in very small agencies, to relatively sophisticated, comprehensive programs in others.

In our sample of fifty respondents, nine say they provide standards of conduct orientation sessions, seven provide written material only, and eight provide both lectures and written material. Others use a variety of methods, including videotapes, bulletins from the Inspector General (IG), seminars for managers,

and personal briefings for presidential appointees. A number of agencies report that they provide a combination of these methods. The General Services Administration, for example, makes use of videotapes and written materials in briefings and counseling services conducted for all its employees, as well as in seminars and other formal training courses for supervisors and managers.

Over half the DAEOs in our sample say they provide ethics education to all their employees. In other agencies, the training is targeted at specific groups of employees, such as personnel specialists, middle management, supervisors, senior employees, or new SES and presidential appointees. These activities are provided annually in nine agencies, semi-annually in three others, and up to five or six times annually in four agencies. In nine agencies, standards of conduct training is provided "as needed."

Instruction regarding financial disclosure requirements and post-employment restrictions goes on in all but five of the agencies in our sample, according to our respondents. It most often consists of counseling and informational memoranda or pamphlets. Some DAEOs send letters at the time of filing or termination and disseminate federal regulations on these subjects. A few conduct regular orientation sessions (some making use of videotapes) or include this information as part of the broader standards of conduct briefing. DAEOs in two agencies conduct personal discussions with first-time filers of financial disclosure forms. One ethics official circulates written opinions regarding post-employment conflict situations.

In thirteen agencies DAEOs report that instruction in these two areas is provided to all employees. In the majority of agencies, however, education on financial filing and post-employment is targeted at SES and executive level positions.

DAEOs in twelve agencies say that this information is available "as needed" or "on request". Others provide it regularly, either monthly, semi-annually, or upon entry and exit. The Veterans Administration and the National Labor Relations Board combine these approaches by providing regular instruction at entry and exit as well as annually.

Most agency respondents indicated that they distribute written materials (other than regulations) covering standards of conduct. Ten, however, do not. Sixteen agencies provide this information to all their employees; the others disseminate it either to all new employees, senior officials, or managers and supervisors. Fifteen agencies provide these standards at the time of entry and four do so on an annual basis. However, thirteen agencies distribute this information only "as needed." Every DAEO in our sample considers the materials used by his or her agency to be adequate.

The quality of written information regarding standards of conduct varies widely. On one end of the spectrum are those agencies that distribute only copies of their regulations. On the other end are agency ethics materials that explain the regulations, address ethics problems specific to the business of the agency in question, and provide examples of frequently encountered ethical issues. Twenty-nine respondents said their

written materials address specific agency problems, while in eight cases the materials do not. In twenty-four cases in our sample, these materials include examples as an explanatory device; materials from twenty-two agencies, however, do not include examples.

An Environmental Protection Agency pamphlet entitled "Guidance on Ethics and Conflicts of Interest," disseminated to all EPA employees, represents one of the more comprehensive efforts in this area.^{*/} This thirty-page booklet addresses the broad issues of financial interests and disclosure, representing outsiders, post-employment restrictions, supplementation of government salary and outside employment, travel expenses, use of government property, political activity, and acceptance of gifts, gratuities, and entertainment. In our view, the pamphlet effectively summarizes and explains the conflict of interest laws and EPA regulations providing numerous agency- and program-specific examples.

Common Cause believes that other agencies provide useful explanatory materials as well. The Federal Mediation and Conciliation Service's directive on employee responsibilities and conduct contains explanations of the full range of potential ethics problems plus a code of professional conduct for labor mediators. The National Science Foundation's conflict of interest rules and standards of conduct manual is another good model,

^{*/} The current DAEO at EPA was appointed in January 1983.

as are the guides produced by the Department of the Interior and the Air Force, among others.

Most DAEs say they either distribute copies of their standards of conduct regulations or provide an oral briefing to all their employees, although some do so only on request. Only a small number of agencies limit this information to specific groups of employees, such as political appointees, SES members, or those required to file confidential disclosure statements.

Nearly half of our respondents require all employees to certify that they have received the written materials and any oral briefing provided by the agency. This mechanism is intended to encourage employees to pay careful attention to the ethics materials they receive.

Public and Confidential Disclosure Systems

DAEs are also required by regulation to ensure that: "an effective system and procedure for the collection, filing, review, and, when applicable, public inspection of the financial disclosure reports as required by Title II of the Act, Executive Order 11222, and other applicable statutes and regulations is developed and properly administered." [5 C.F.R. §738.203(b)(2)] Through the information provided by financial disclosure reports, ethics officials can be alerted to potential financial conflicts of interest and can take steps to resolve them. Respondent agencies appear to operate reasonably good programs in these areas.

All but three agencies in our sample maintain a list of all employees who must file both confidential and public reports. Timely filing is ensured in twenty agencies by monitoring performed by the DAEO or the DAEO's staff. Seven agencies send a written notification to employees required to file, monitor the filing, and issue a reminder when necessary. In six agencies in which the DAEO is located in the general counsel's office, the personnel office provides assistance. The Department of the Interior uses its monthly statistical report to monitor timely filing, the Environmental Protection Agency encourages accountability by requiring written certification of reports from the deputy counselors to the DAEO, and the Veterans Administration distributes a return envelope along with the forms and a letter of introduction and a follow-up. The Federal Communications Commission uses a roster with due and filing suspense dates, while other agencies rely on tickler lists.

The reporting DAEOs indicated that the vast majority of public reports are filed in a timely manner, but there was somewhat greater tardiness with respect to the filing of the larger number of confidential reports. Only four DAEOs report that some public disclosure forms remained outstanding beyond the 1983 required completion date, while ten DAEOs noted outstanding confidential forms beyond that time.

All but five of our respondents said that the reports elicit the information necessary to determine whether a conflict exists. Several DAEOs, however, cited problems with the public disclosure

form, seeing it as overly complicated and time-consuming to complete.

A number of changes were also recommended. One DAEO would like to have information pertaining to categories of value below those on the public financial disclosure forms; another would like memberships in associations to be included on the confidential reports. It was also suggested that confidential reports include specifics on the amount of holdings an employee has in firms subject to the agency's jurisdiction and that public reports identify loans under \$10,000.

Agencies try to ensure timely filing in their regional offices in a variety of ways. Most often the responsibility lies with the central DAEO staff or personnel office. Several agencies rely on monthly statistical reports or completion reports combined with follow-up. In a few agencies responsibility rests with the regional counsel, deputy ethics officer in the region, or regional director or office head. The Environmental Protection Agency requires that confidential statements be reviewed by the regional administrator and certified by deputy ethics counselors in Washington.

In order to resolve potential conflict situations, ethics officers employ a range of actions. The methods most frequently reported by our respondents included counseling that leads to divestiture, recusals and waivers, disqualification or reassignment. Less frequently mentioned methods range from talks with OGE, the Department of Justice or the office director, to

cautionary letters, blind trusts, cessation of the activity in question, and resignation.

Our respondents reported that a fairly small number of conflicts or potential conflicts have come to their attention in the past year. While thirteen agencies said no conflicts came to their attention, eleven reported between one and five conflicts, eight noted between six and fifteen conflicts, two recorded between sixteen and 25, six agencies confronted between 26 and 100, and three agencies dealt with over 100 conflict situations. The larger number of conflicts tend to be found in the larger agencies.

In response to these conflicts, agencies relied most heavily on divestitures and written recusals. Unwritten recusals, waivers, reassignments, and pension or stock ownership exemptions are used less often. Ethics officials attempt to ensure that these actions are taken through follow-up by the DAEO, a letter from the subject, preparation of a final report on the matter by the DAEO, DAEO review of subsequent financial disclosure reports, personal interviews, or informing the subject's supervisor.

In instances of failure to file the required reports, ten respondents state that they send a follow-up letter. Eight ethics officials speak directly to the individual, six use phone calls or issue warnings of referral to the Department of Justice, and four others report that they take disciplinary action. A number of other agencies make referrals to the agency head, issue a demand letter, rely on follow-up by the subject's supervisor, threaten removal or other sanctions, or refer to OGE. Ten DAEOs

reported that failure to file financial disclosure reports has not been a problem in their agencies.

In the vast majority of agencies in our sample, DAEOs report that all employees required to file by May 15, 1983 had done so by November 15, 1983. In three agencies less than 1 percent of required filers had not complied with this requirement by November, and in four agencies between 1 and 5 percent were still out of compliance six months after the filing deadline.

Nearly every survey respondent has developed a system for making public financial disclosure reports available to the public upon request. In most agencies the reports are available from the DAEO or ethics office, although some agencies keep them in public affairs departments, public reference rooms, or in personnel offices. Several agencies noted that they have never received a request for this information.

Evaluations of both public and confidential disclosure systems are performed most frequently by OGE. In a small number of agencies such evaluations have also been performed by the DAEO, the General Accounting Office, the agency IG or any other internal audit group.

Determination of Conflict of Interest

The process ethics officials use to make determinations of financial conflicts of interest is crucial to the success of an agency's ethics program. The more thorough and comprehensive the procedures used, the more likely that potential conflicts will be spotted and prevented. Most of our respondents report that they

make conflict determinations by ascertaining whether a direct relationship exists between an employee's duties and his or her private interests, but did not specify how this is done.

A small number of our respondents report that they compare an employee's holdings with a list of agency contractors or grantees. Others refer to published reference sources such as Standard and Poor's. Some agencies also use a copy of the employee's position description. In many agencies, however, conflict determinations are made on the basis of judgment by the DAEO, supervisor, or legal staff. In these cases it appears that the process is ad hoc, which raises questions about the comprehensiveness and consistency of the decisions that are made.

The process used by the Environmental Protection Agency since August 1983 represents an example of a highly organized system for making conflict determinations. That agency has developed standard operating procedures for review of public disclosure forms by DAEO staff. The process includes research of reported financial interests through Moody's or Standard and Poor's, or by direct telephone contact with the entity in question for clarification. This part of the process, in addition to instruction on notification of filers, action to take upon failure to file, and options for resolution of potential conflicts, is explained in three separate three-page memos sent to all deputy counselors for conflict of interest. The memos address new entrants' reports, annual reports, and termination reports. The combination of the procedures clearly set forth in these memos and the Environmental Protection Agency guide on

ethics and conflicts of interest represent a comprehensive approach to the difficult job of making conflict determinations.

In nearly every agency in our sample, either the DAE0 or the DAE0 staff makes these determinations. In a small number of cases others are also involved, such as supervisors, local ethics officials, division heads, or personnel staff. In all cases our respondents report that those responsible for making conflict determinations are knowledgeable about the job responsibilities of the reporting employee.

The majority of DAE0s in this survey do not maintain a current list of all financial holdings that would constitute a conflict for that agency. Many DAE0s say that such a list would be impossible to compile in light of the breadth of the agency's activities; others state that creation and maintenance would be difficult because of constantly changing circumstances, or that it would be too costly. Nonetheless, such lists have been constructed at twelve agencies as aids to making conflict determinations.

To the extent that agency staff receive training to help them make these determinations, the largest number rely on OGE annual conferences and special training courses. Twelve agencies report that they conduct in-house training, and seven issue written guidance in this area. Several others have also received education on conflict of interest from the Department of Justice or the Office of Personnel Management. Seven DAE0s say their staff is already experienced in making these determinations and ten did not respond to this question.

In most agencies, DAEs alert employees that they are required to file either the public or confidential financial disclosure form. Personnel officers send memos to such employees in a small number of agencies. Other methods used to inform employees of this responsibility include memos from deputy counselors, local ethics officials, or the agency head, as well as notification through agency bulletins that list all covered positions.

According to our results, the filing process has elicited over 100 potential conflicts in one agency, but in ten other agencies it has elicited none. Sixteen respondents say the process has led to detection of up to 5 potential conflicts in the past year, six agencies were alerted to between 6 and 15 conflicts, three agencies learned of between 16 and 50 conflicts, and one agency was alerted to between 51 and 100 conflicts through the reporting process. Again, there appears to be a relationship between agency size and the number of conflicts detected through the filing process.

Eighteen agencies report that the majority of financial conflicts come to their attention through the filing process, and six say the majority are signalled by the Inspector General. In twelve agencies DAEs generally learn of potential conflicts directly from individuals requesting advice. Potential conflict situations also surface through personnel offices, IG hotlines, anonymous allegations, occasionally through supervisors and regional directors, and through self-disclosure when an employee becomes aware of an apparent conflict.

In fifteen agencies full and complete filing is encouraged by a requirement that employees certify in writing that, to their knowledge, they do not have any financial conflicts of interest.

Agency Regulations

Regulations at 5 C.F.R. §738.203(b)(10) require DAEs to ensure that: "The agency's standards of conduct regulations, financial disclosure systems and post-employment enforcement systems are evaluated periodically to determine their adequacy and effectiveness in relation to current agency responsibilities." With respect to standards of conduct regulations, twenty of the agencies in our sample have completed revisions within the past year, and nineteen others have done so within the past three years. Only a handful have not updated their regulations since 1981. In all but five cases these changes reflect statutory changes called for by the Ethics in Government Act of 1978.

Post-Employment

Title V of the Ethics in Government Act concerns post-employment restrictions on former federal employees. These restrictions are central to the prevention of conflicts of interest for persons with past ties to the government and present ties to the private sector. They include a range of prohibitions linked to the degree of responsibility the former federal official exercised on a particular matter.

DAEs identified post-employment issues with great frequency in response to a question regarding the biggest ethics problems

they faced. Post-employment problems were mentioned by DAEs in fifteen agencies, compared with problems concerning the receipt of gifts, reimbursements, gratuities and honoraria (fifteen), outside holdings (nine), off-duty employment (nine), and travel (seven). A range of other ethics problems was noted by ethics officials in a smaller number of agencies.

Despite the relative importance DAEs ascribed to this problem, only four said they provide information on post-employment restrictions to all departing employees. Twenty-two DAEs frequently supply this information on request, eighteen provide it occasionally, and three do so rarely.

A number of ethics officials distribute useful written materials on post-employment restrictions. The DAE at the Federal Communications Commission, for example, distributes a set of materials to departing employees regarding post-employment rulings specific to that agency, as well as a copy and summary of the regulations. In other agencies, such as the Federal Home Loan Bank Board and the Office of the Federal Inspector for the Natural Gas Transportation System, short (two or three pages) explanations of the regulations that govern post-employment restrictions are provided.

Despite the provision of these materials in many agencies, monitoring of compliance with post-employment restrictions varies greatly. Table I demonstrates that compliance is monitored frequently in sixteen agencies, done occasionally in fifteen others, monitored rarely in eleven agencies and never monitored in eight others. Of those ethics officials who do monitor

TABLE I

DAEO Responses to the Question: "Does Your Agency Monitor Compliance with Post-Employment Rules?"

Frequently

Corporation Counsel of the District of Columbia
Defense Mapping Agency
Department of the Air Force
Export-Import Bank
Federal Home Loan Mortgage Corporation
Federal Trade Commission
General Services Administration
Internal Revenue Service
Merit Systems Protection Board
National Labor Relations Board
National Science Foundation
Overseas Private Investment Corporation
Securities and Exchange Commission
Synthetic Fuels Corporation
Tennessee Valley Authority
Veterans Administration

Occasionally

Defense Communications Agency
Defense Contract Audit Agency
Defense Logistics Agency
Department of the Army
Department of Education
Department of Justice
Equal Employment Opportunity Commission
Federal Deposit Insurance Corporation
Federal Emergency Management Agency
Federal Maritime Commission
National Aeronautics and Space Administration
National Transportation Safety Board
Nuclear Regulatory Commission
Office of Science and Technology Policy
Pension Benefit Guarantee Corporation

Rarely

Agency for International Development
Consumer Product Safety Commission
Department of Agriculture
Department of Health and Human Services
Department of the Interior
Federal Energy Regulatory Commission
Federal Home Loan Bank Board
Federal Mine Safety and Health Review Commission

Federal Reserve Board
Interstate Commerce Commission
Office of the Federal Inspector for the Natural Gas
Transportation System

Never

Armed Services Board of Contract Appeals
Council on Environmental Quality
Department of Commerce
*Environmental Protection Agency
Federal Communications Commission
*Federal Mediation and Conciliation Service
General Accounting Office
U.S. Commission on Civil Rights

* Agency responded "no" to the question.

compliance, many do so only when allegations of noncompliance are made either by the Inspector General or by a current employee.

Other Ethics-related Services

All but nine of our respondents said that they perform additional ethics-related activities. These include dissemination of memoranda and articles about specific ethics issues, distribution of advisory opinions, special briefings to executives and advisory board members, and circulation of a list of prohibited financial holdings.

Overall Compliance

Section 206(b)(7) of the Ethics In Government Act requires maintenance of a record of situations that have resulted in noncompliance with ethics laws and regulations as an element of all agency ethics programs. However, in eighteen of the agencies in our sample, ethics officials do not maintain this information (see Table II). These agencies appear to be violating this section of the Act.

Efforts to ensure that situations of noncompliance do not recur focus on both the individual and the agency as a whole. Individual remedies include case-by-case follow-up, counseling, informal monitoring, and performing special reviews of subsequent financial disclosure forms. On the agency level, responses include stressing problem issues in newsletters or semi-annual reminders, issuing bulletins on specific ethics problems, adding

TABLE II

DAEO Responses to the Question: "Do You Maintain a List or Record of Situations That Have Resulted In Non-Compliance with Ethics Laws and Regulations?"

Yes

Agency for International Development***
 Consumer Product Safety Commission
 Corporation Counsel of the District of Columbia
 Defense Logistics Agency
 Defense Mapping Agency
 Department of the Air Force
 Department of the Army
 Department of Commerce
 Department of Education
 Department of Health and Human Services
 Department of Interior
 Department of Justice
 Environmental Protection Agency**
 Equal Employment Opportunity Commission
 Export-Import Bank
 Federal Home Loan Bank Board
 General Accounting Office
 Internal Revenue Service
 Interstate Commerce Commission
 National Labor Relations Board
 Office of the Federal Inspector for the Natural Gas Transportation System
 Office of Science and Technology Policy
 Tennessee Valley Authority

No

Council on Environmental Quality
 Defense Communications Agency
 Defense Contract Audit Agency
 Department of Agriculture
 Federal Communications Commission
 Federal Deposit Insurance Corporation*
 Federal Emergency Management Agency
 Federal Maritime Commission
 Federal Mine Safety and Health Review Commission
 National Aeronautics and Space Administration
 National Science Foundation
 Nuclear Regulatory Commission
 Synthetic Fuels Corporation
 U.S. Commission of Civil Rights
 Veterans Administration

No Answer

Department of Defense/Armed Services Board of Contract Appeals

Not Applicable

Overseas Private Investment Corporation

No Non-compliance

Federal Reserve Board

* Plan to implement system in 1984.

** Reflected in training materials. Reading files include record of questions that have arisen.

*** In process of compiling records.

Information to regular training sessions and adjusting agency regulations.

Ensuring that employees in regional offices are in compliance with the agency's overall ethics program poses a more difficult problem. DAEs in a number of agencies monitor their regional offices either by phone or by direct contact. Other agencies rely on inspections by the IG or other headquarters staff (e.g., the Judge Advocate General at the Department of the Air Force). A smaller number of agencies rely on field reports sent regularly to headquarters, supervision by regional attorneys (who in turn are supervised by the DAE), and monitoring by district directors. A few agencies have had regional office audits conducted by OGE and the General Accounting Office.

With respect to ensuring the complete and timely filing of financial disclosure forms, a few agencies rely on central review, while one requires deputy ethics counselors in the regions to certify the forms.

Ethics Counseling

Counseling programs for agency employees concerning all ethics and standards of conduct matters, another key component of agency ethics programs, is required by regulation at 5 C.F.R. §738.203(b)(7). Ethics counselors play an important role by answering questions regarding standards of conduct and financial disclosure requirements and by giving informal oral opinions and sometimes formal written opinions. In large agencies, where the DAE might be inaccessible to employees with ethics questions,

knowledgeable counselors can provide especially useful service. As in other areas, agency efforts vary with respect to the counselors' background, training and the services they render.

Although the lion's share of counselors comes from the general counsel's staff, in some agencies counselors include the director and staff of the office of personnel or administration, division heads, employee relations specialists, regional administrators and local ethics officials.

Most of the training these people receive is provided by OGE. In addition, eleven agencies hold their own in-house seminars and one DAEO conducts teleconferences with counselors in the regions. A number of others rely on on-the-job training and supervision from more experienced counselors. A small number take advantage of ethics training provided by the Department of Justice Legal Education Institute and other outside seminars.

All but two of our respondents render informal oral opinions on ethics questions, while a slightly smaller number (all but seven) render formal written opinions. In slightly more than half of our sample the primary agency ethics counselor circulates opinions to other ethics officials within the agency. A log file of opinions rendered is maintained by thirty-three agencies.

Employees learn about the availability of ethics counseling in a variety of ways. Most often announcements are published in memos or newsletters. Many agency ethics regulations also mention the provision of counseling services. Other agencies announce the availability of these services at their regular orientation sessions or in their code of conduct handbooks. At

the General Services Administration eye-catching posters are displayed that advertise the availability of counseling services as well as the name, room number and telephone number of the appropriate deputy standards of conduct officer.

IG Referral

Regulations set forth at 5 C.F.R. §738.203(b)(12) require DAEOs to ensure that: "The services of the agency's Office of the Inspector General, if any, are utilized when appropriate, including the referral of matters to and acceptance of matters from that Office." Inspector General Investigations provide an additional mechanism for the discovery of standards of conduct problems. Further, once such problems come to the DAEO's attention (either through the IG or some other means), some serious cases might be referred to the IG for corrective action. Results from our survey indicate that contact between agency ethics offices and IGs is not widespread and could be increased.

Only eighteen agencies in our sample have developed formal guidelines for making referrals for investigation to the IG or other audit group. Ethics office staff initiate contact with the IG (or other audit group) regarding investigations of conflict of interest frequently at nine agencies, occasionally at nine, rarely at thirteen, and never at eleven agencies.

More contact appears to be initiated by the audit groups. When asked if the agency IG or other audit group contacts the ethics office before beginning investigation of matters of conflict of interest, twenty-six agencies replied that such

contacts are made. However, even in those situations the IG contact tends to occur only in an ad hoc manner and is not part of any regular, on-going communication with the agency ethics offices.

General Assessment

Overall, survey respondents tended to rate the quality of their ethics programs relatively high. Eighteen agencies report that their programs are "excellent," nineteen consider their programs "very good," and ten rate themselves as "good."

Twenty-four DAEs say their ethics programs do a "very good" job in reaching all agency employees, eighteen state that they do a "good" job, and four consider the job they do in this regard to be "fair." One respondent noted that resource constraints prevent his agency from doing a better job of providing ethics training and counseling to all employees. Although DAEs in 31 agencies report that 100% of persons required to file financial disclosure forms are aware of this requirement, in one agency approximately 95% know of it, and only an estimated 80% are currently aware of it in one other.

Thirty respondents stated that their ethics programs could be improved with additional training. Nine DAEs reported the need to strengthen their monitoring of post-employment conflicts of interest; three highlighted the need to improve monitoring of financial conflicts of interest; two pointed out current weakness in the provision of advice and counseling; and two others believe that more written guidelines could improve their program. A number of others indicated there is always room for improvement in every area.

Other DAEs said that their ethics efforts would be aided by greater resources, more frequent internal audits, updating of standards of conduct regulations, and better monitoring of recusal situations.

III. PROPOSALS FOR CONSIDERATION

Data provided through responses to our questionnaires by Designated Agency Ethics Officials lead us to conclude that ethics programs could be strengthened in a number of areas. Although the information provided by these DAEOs reflects only part of the total picture, Common Cause believes that their perspective has highlighted some important problems. Most agencies could improve their ethics programs by expanding or increasing their efforts in the areas listed below.

- 1) Visibility of ethics programs within many agencies appears to be low. Increased visibility could be encouraged through greater support from agency heads and the White House.
- 2) Many DAEOs and their deputies are unable to spend sufficient time on ethics responsibilities. Enabling these officials to spend a greater amount of time on ethics would improve the quality of the programs as well as increase their identity and independence.
- 3) Regular ethics training on the broad range of standards of conduct issues needs to be strengthened in a number of agencies. Unless good reason exists to provide this service less frequently, we believe an ethics briefing should be made available at least annually to all agency employees.
- 4) Much of the written material used by DAEOs for ethics education is not presented in an effective manner. We support OGE's suggestion to agencies that written ethics materials include explanations of the standards of conduct regulations as well as agency-specific examples of how they apply.
- 5) In an effort to encourage employees to read ethics materials presented to them and to take these materials seriously, many agencies require employees to certify that they have received and read these materials at the time they join the agency. OGE should determine whether the certification process is useful, and if so, urge all DAEOs to implement it.

- 6) Counseling services are not adequately publicized in many agencies. One way to increase employee awareness of counseling is through the use of posters and notices like those in use at the General Services Administration.
- 7) Ethics counselors in many agencies do not receive sufficient training and written guidance. DAEs should devote greater attention to this aspect of their ethics programs.
- 8) Review of financial disclosure forms and procedures for determination of financial conflicts of interest are ad hoc in many agencies. More systematic review and procedures might help reduce the potential for financial conflicts. Random audits -- conducted either by the agency Inspector General, OGE, or by a private auditing firm -- might also prove useful.
- 9) One way to encourage accurate and complete filing of financial disclosure reports would be to require filers to certify that, to their knowledge, they have no financial conflict of interest.
- 10) Despite the fact that compliance with post-employment restrictions was listed as a major problem area, monitoring is weak or nonexistent in many agencies. Increased monitoring in this area is needed.
- 11) Communication between DAEs and inspectors general or other audit groups is weak in most agencies. DAEs should attempt to strengthen those ties.

We also believe, on the basis of responses from DAEs, that ethics programs could be strengthened if OGE were to prepare and disseminate a "how-to" handbook for DAEs (along the lines of its three-page "Elements of a Model Ethics Program" and other materials prepared for OGE annual conferences), and increase its efforts to explain to high-level government employees the need for public financial disclosure. Further, programs could be strengthened if Congress enabled OGE to provide more training sessions for agency ethics officials and conduct more audits of agency ethics programs.

IV. CONCLUSIONS

Data obtained from this preliminary study have begun to answer some questions about how ethics programs are being implemented by agency ethics officials. From DAE0 self-reports it appears that these programs have limited visibility and scope in most agencies. Ethics officials usually have many other responsibilities and are not able to treat ethics as a high priority.

In response to this situation, many DAE0s focus on meeting the financial disclosure reporting requirements set forth in the Ethics in Government Act, often neglecting their broader responsibilities for ethics education and training. Insufficient commitment from many high-level officials, both in the White House and within the agencies, and the resource constraints that flow from this are the likely causes of the problem. Despite these obstacles, however, the study found examples of some interesting and innovative approaches that DAE0s employ to minimize conflicts of interest.

Examination of the questionnaire data also raises some questions that could be pursued in future studies:

- o How do government employees regard the implementation of agency ethics programs? Their views would provide an important supplement to the picture painted by the DAE0s.
- o How could OGE be of greater service to the agencies in promoting ethics education and preventing conflicts of interest? Evaluation of OGE activities and resources could produce information that would be useful to the public and to Congress as well as OGE in planning for its future activities and staff needs.

Agency ethics programs play a crucial role in educating government employees about the standards of conduct they are expected to uphold. If the American public is to have faith in the integrity of its public officials, effective implementation of these programs must be assured.

APPENDIX AAgencies that Responded to the Common Cause Questionnaire (50)

Armed Services Board of Contract Appeals
Consumer Product Safety Commission
Council on Environmental Quality (Executive Office of the President)
Defense Communications Agency
Defense Contract Audit Agency
Defense Logistics Agency
Defense Mapping Agency
Department of Agriculture
Department of the Air Force
Department of the Army
Department of Commerce
Department of Education
Department of Health and Human Services
Department of the Interior
Department of Justice
District of Columbia Government Corporation Counsel
Environmental Protection Agency
Equal Employment Opportunity Commission
Export-Import Bank
Federal Communications Commission
Federal Deposit Insurance Corporation
Federal Emergency Management Agency
Federal Energy Regulatory Commission
Federal Home Loan Bank Board
Federal Home Loan Mortgage Corporation
Federal Maritime Commission
Federal Mediation and Conciliation Service
Federal Mine Safety and Health Review Commission
Federal Reserve Board
Federal Trade Commission
General Accounting Office
General Services Administration
Internal Revenue Service
Interstate Commerce Commission
Merit Systems Protection Board
National Aeronautics and Space Administration
National Labor Relations Board
National Science Foundation
National Transportation Safety Board
Nuclear Regulatory Commission
Office of the Federal Inspector for the Alaska Natural Gas Transportation System
Office of Science and Technology Policy (Executive Office of the President)
Overseas Private Investment Corporation
Pension Benefit Guaranty Corporation
Securities and Exchange Commission
Tennessee Valley Authority

U.S. Commission on Civil Rights
U.S. International Development Co-Operation Agency (AID)
U.S. Synthetic Fuels Corporation
Veterans Administration

Agencies that Provided Some Information about their Ethics
Programs but did not Respond to the Common Cause
Questionnaire (3)

Administrative Conference of the United States
Central Intelligence Agency
Foreign Claims Settlement Commission of the United States/
Department of Justice

APPENDIX BAgencies that did not Respond to
the Common Cause Questionnaire (38)

ACTION

Civil Aeronautics Board
Commodity Futures Trading Commission
Defense Intelligence Agency
Department of Defense
Department of Energy
Department of Housing and Urban Development
Department of Labor
Department of the Navy
Department of State
Department of Transportation
Department of the Treasury
Executive Office of the President
 Council of Economic Advisers
 Counsel to the President
 National Security Council
 Office of Administration
 Office of Management and Budget
 Office of the Vice President
 Office of the U.S. Trade Representative
 President's Commission on Executive Exchange
Farm Credit Administration
Federal Election Commission
Immigration and Naturalization Service
International Trade Commission
National Capital Planning Commission
National Credit Union Administration
National Mediation Board
National Security Agency
Occupational Safety and Health Review Commission
Office of Personnel Management
Peace Corps
Postal Rate Commission
Pennsylvania Avenue Development Corporation
Selective Service System
Small Business Administration
U.S. Arms Control and Disarmament Agency
U.S. Information Agency
U.S. Postal Service

APPENDIX CCOMMON CAUSE ETHICS STUDY QUESTIONNAIRE

Dear Ethics Official:

Common Cause appreciates your help in completing the following questionnaire as part of our Independent study of agency ethics programs. We are interested to learn how ethics programs are being implemented by the agencies, and with what effectiveness. The study will focus on two questions: 1) how is the absence of conflicts of interest being ensured, and 2) of what do the various agency ethics education efforts consist?

Please answer the following questions by circling the appropriate response or filling in the blanks. Thank you for your cooperation.

Agency or Department: _____

Name and title of person completing this survey: _____

Phone # _____

Name and title of the Designated Agency Ethics Official (DAEO): _____

Would you be interested in attending a gathering to discuss the study findings? YES _____ NO _____

1. Background information

A. Where is the DAEO situated in the agency?

1. General counsel's or solicitor's office
2. Other (please specify) _____

B. What is the DAEO's professional background?

1. Law
2. Personnel management
3. Other (please specify) _____

C. How long has the DAEO had responsibility for the agency's ethics program?

1. Less than one year
2. One-two years
3. Longer than two years

- D. Has the DAEO had training regarding standards of conduct restrictions, conflicts of interest and the Ethics in Government Act?
1. Yes
 2. No
- If yes, was it provided: In-house____ by OGE____ other____
 If yes, how long did it last?
- one day _____
 - two to five days _____
 - more than five days _____
- E. Approximately how many employees are the DAEO and her/his staff responsible for advising on ethics issues:
- In Washington, D.C.? _____
 - In the regional offices? _____
- F. What is the DAEO's GS/GM/SES or executive level? _____
- G. Approximately what percentage of the DAEO's time is devoted to performing ethics responsibilities (i.e., providing information and answering questions regarding the Ethics in Government Act and standards of conduct restrictions)?
 _____ %
- H. How many staff, if any, does the DAEO have to assist with ethics responsibilities?
- Washington staff _____
 - regional staff _____
- I. What percentage of the staffs' collective time is devoted to the following ethics responsibilities? (not including regional staff)
- monitoring public disclosure forms _____
 - monitoring confidential disclosure forms _____
 - ethics counseling _____
 - other ethics obligations _____
- J. Describe the contact between the DAEO and regional staff:
-
- K. What is the professional breakdown of the regional staff?
- Law _____
 - Personnel _____
 - Other (please specify) _____

2. Relationship with the Office of Government Ethics (OGE)

A. Type of contact

1. Routine information provision
2. Non-routine, problem-oriented
3. Both of the above
4. Other (please specify) _____

B. Frequency of contact

1. Once a week
2. Once every two weeks
3. Once every three to four weeks
4. Less often

C. Usefulness of contact regarding general ethics information

1. Very useful
2. Useful
3. Not useful

D. Usefulness of contact regarding specific ethics situations or problems

1. Very useful
2. Useful
3. Not useful

E. How effective is OGE overall?

1. Very effective
2. Somewhat effective
3. Not effective

F. What services would you like OGE to provide that it does not now provide?

1. Dissemination of a "how-to" handbook on duties of an agency ethics official
2. More frequent agency audits by OGE
3. Other (please specify) _____

G. Suggestions to improve contact: _____

3. Public and confidential financial disclosure systems

A. Do you maintain a list of all employees who must file:

confidential reports?	1. yes	2. no
public reports?	1. yes	2. no

B. Approximately how many employees are required to file:

confidential reports?	_____
public reports?	_____

C. What procedures does your agency have to ensure that all reports, including termination reports, are collected and filed on a timely basis? _____

o Has review of all confidential forms due in May, 1983 been completed?

1) yes 2) no

If yes, when was it completed? _____

If no, what percentage are now completed? _____

o Has review of all public forms due in May, 1983 been completed?

1) yes 2) no

If yes, when? _____

If no, what percentage are now completed? _____

D. Do these reports provide the information you need to determine whether a conflict exists?

1. Yes
2. No

If no, what information should they contain? _____

E. How is timely filing ensured in the regional offices?

_____F. What actions are taken to resolve conflicts disclosed on the forms? _____

- o How many conflicts came to the attention of you and your staff had in the past year? _____
- o How many of the following actions have been taken by employees in your agency during the past year?
1. Divestitures _____
2. Written recusals _____
3. Unwritten recusals _____
4. Other remedies (please specify) _____
- o How do you ensure that these actions have been taken?
- _____
- G. What actions are taken to remedy failure to file?
- _____
- _____
- H. Approximately what percent of those employees required to file on May 15, 1983 had not done so by Nov. 15, 1983?
- _____ %
- I. Please describe your public report availability system.
- _____
- _____
- _____
- J. When was the adequacy of your public financial disclosure system last evaluated? _____
- By whom?
1. OGE
2. GAO
3. Agency Inspector General
4. Other (please specify) _____
- K. Please describe how you determine which positions are subject to confidential filing requirements for all grade levels below GS 13.
- _____
- _____
- _____
- L. When was the adequacy of your confidential disclosure system last evaluated?

By whom?

1. OGE
2. GAO
3. Agency inspector General
4. Other (please specify) _____

4. Determination of when a conflict of interest exists

- A. Please describe the process you use to make such determinations. If you do not have specific procedures, please explain how you make determinations.

o Who is responsible for making these determinations?

o Do these people have knowledge of the employee's job responsibilities? 1) yes _____ 2) no _____

- B. Do you maintain a current list of all financial holdings that would constitute a conflict for your agency (including all grantees and contractors)?

1. Yes
2. No

If no, please explain why. _____

- C. Describe training provided to your staff to enable them to make determinations regarding conflicts of interest.

- D. How are employees alerted that they must file public financial disclosure forms?

1. Memo from the DAEO
2. Memo from the personnel officer
3. Other (please specify) _____

E. Are presidential appointees part of this system?

1. Yes
2. No

If no, please explain how they are alerted. _____

F. How are employees alerted that they must file confidential financial disclosure forms?

1. Memo from the DAEO
2. Memo from the personnel officer
3. Other (please specify) _____

G. How many conflicts come to the DAEO's attention annually through the filing process? _____

Do the majority of serious conflicts come to the DAEO's attention through:

- filing process _____
- Inspector General _____
- other means (please specify) _____

H. Does your agency require employees to certify in writing that, to their knowledge, they do not have any financial conflicts (in addition to filing a financial disclosure form)?

1. Yes
2. No

5. Agency regulations

A. When were your agency's regulations most recently updated (including minor amendments as well as major revisions)?

1. Within the last year
2. Within the last three years
3. Within the last five years
4. More than five years

B. Do they reflect changes resulting from the Ethics in Government Act of 1978?

1. Yes
2. No

6. Ethics training and education programs

A. Does your agency provide ethics training for employees concerning standards of conduct?

1. Yes
2. No

If yes:

- o What does it consist of? _____

- o For which employees is it provided? _____

- o How often is it provided? _____

B. Does your agency provide instruction concerning financial disclosure requirements and post-employment restrictions?

1. Yes
2. No

If yes:

- o What does it consist of? _____

- o For which employees is it provided? _____

- o How often is it provided? _____

C. Does your agency or do your organizational units have written material (other than regulations) that explains standards of conduct for employees?

1. Yes
2. No

If yes:

- o To whom is it disseminated? _____

- o When is it disseminated? _____
- o Do you consider it adequate? (1) yes (2) no
- o Please enclose a copy
- D. Do your written materials address problems specific to your agency?
1. Yes
 2. No
- E. Do your regulations or other written materials include examples for explanation purposes?
1. Yes
 2. No
- F. Does your agency provide a copy of the regulations and an oral briefing on them to:
- | | | |
|-------------------------------|--------|-------|
| political appointees | 1. Yes | 2. No |
| SES members | 1. Yes | 2. No |
| those subject to confidential | 1. Yes | 2. No |
| filing requirements | | |
| all employees | 1. Yes | 2. No |
- G. Does your agency require all employees to certify that they have received the written materials and any oral briefing provided by the agency?
1. Yes
 2. No
- H. Does your agency provide information on post-employment restrictions to all departing employees?
1. Frequently
 2. Occasionally
 3. Rarely
 4. Never
- I. Does your agency monitor compliance with post-employment rules?
1. Frequently
 2. Occasionally
 3. Rarely
 4. Never
- J. Does your agency provide any other ethics-related service for current employees?

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1. Yes

- ☐ Circulate memos or articles on standards of conduct
- ☐ Other (please specify) _____

2. No

K. Do you maintain a list or record of situations that have resulted in noncompliance with ethics laws and regulations?

- 1. Yes
- 2. No

In situations of noncompliance, how do you ensure that they do not recur? _____

L. How does your agency ensure regional offices are in compliance with its overall ethics program?

7. Ethics counseling

A. Who participates as counselors? _____

B. How are these participants trained? _____

C. Do they render: Informal oral opinions? 1. Yes 2. No
formal written opinions? 1. Yes 2. No

D. Does the primary agency ethics counselor circulate written opinions to other ethics officials within the agency?

- 1. Yes
- 2. No

- E. Does the primary ethics counselor maintain a log file on opinions rendered?
1. Yes
 2. No
- F. How do employees learn about the availability of counseling services? _____
- _____
- G. How extensively is the service used?
1. Very little
 2. A fair amount
 3. Quite often
8. Coordination with Inspector General, Internal audit, or similar group
- A. Do you have formal guidelines for making referrals for investigation to the Inspector General or other audit group?
1. Yes
 2. No
- B. How often does your office contact the Inspector General or other audit group regarding investigations of conflicts of interest?
1. Frequently
 2. Occasionally
 3. Rarely
 4. Never
- C. Does your IG or other audit group contact you before beginning investigations on matters concerning conflicts of interest?
1. Yes
 2. No
9. General Assessment
- A. How do you rate the quality of your agency's ethics program?
1. Excellent
 2. Very good
 3. Good
 4. Poor

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- B. How good a job does your agency's ethics program do in reaching all agency employees?

1. Very good
2. Good
3. Fair
4. Poor

What percentage of employees in your agency know about their financial disclosure responsibilities? _____ %

- C. In what areas could your agency's ethics program be improved?

1. Ethics training
2. Provision of advice and counseling
3. Monitoring of financial conflicts of interest
4. Monitoring of post-employment conflicts of interest
5. Other _____

- D. What are the three biggest ethics problems your agency faces (including violations of the Ethics in Government Act and agency standards of conduct restrictions)?

- 1.
- 2.
- 3.

- E. Do you think the Ethics in Government Act of 1978 has made a difference in minimizing conflict of interest situations among employees in your agency?

1. Yes
2. No

If no, please explain why not. _____

- F. Other comments:

Please return to: COMMON CAUSE

ATTN: Janet Leno
2030 M Street, NW
Washington, D.C. 20036



General
Services
Administration

Office
of the
Administrator

Washington, DC 20405

Date : April 8, 1985
Reply to : The Acting Administrator (A)
Attn of :
Subject: Employee Standards of Conduct

To : Heads of Services and Staff Offices
All Regional Administrators

We as Federal Government employees have the highest duty to maintain the public trust in the operation and administration of the affairs of the General Services Administration. Discharging that responsibility will require the dedicated efforts of everyone in our agency. The reputation of GSA depends on each of us living up to the standards set forth in the Code of Ethics for Government Service.

There are two aspects of official conduct that affect the way the public sees us that I would like to emphasize:

First, our Standards of Conduct order prohibits acceptance of gifts or hospitality from those seeking to do business with this agency. The reason for the rule is clear. Public confidence in our integrity demands that we not only be impartial in conducting the public's business, but that we avoid even the appearance that official favors can be obtained through personal gratuities. The order provides a number of exceptions to the general rule based on common sense and fairness. For example, gifts from close relatives and friends may be accepted where it is clear that it is that relationship rather than the business of those involved that is the motive and the gift is paid for by the individual, not by his or her company.

Second, we must avoid any action which may result in, or create the appearance of conflict of interests. I do not consider the Standards of Conduct rules to be merely aspirational in nature. The rules are expected to be firmly enforced. Strict observance of the rules will go a long way toward maintaining a positive public image.

Joseph D. Shine, Acting Director, Office of Ethics, is available to provide assistance and guidance regarding the application of the Standards of Conduct.

A handwritten signature in cursive script that reads "Dwight Ink".

DWIGHT INK
Acting Administrator

AUDIT REPORT

PROCEDURES AND CONTROLS FOR FILING FINANCIAL
DISCLOSURE STATEMENTS WITHIN THE
DEPARTMENT OF DEFENSE

No. 85-058

December 24, 1984



OFFICE OF THE INSPECTOR GENERAL
DEPARTMENT OF DEFENSE



DEPARTMENT OF DEFENSE
INSPECTOR GENERAL
OFFICE OF THE ASSISTANT INSPECTOR GENERAL FOR AUDITING
1300 WILSON BOULEVARD, 12TH FLOOR
ARLINGTON, VIRGINIA 22209-2394

MEMORANDUM FOR GENERAL COUNSEL, DEPARTMENT OF DEFENSE

SUBJECT: Report on the Audit of Procedures and Controls
For Filing Financial Disclosure Statements Within
the Department of Defense (Report No. 85-058)

This is our report on the audit of procedures and controls for filing financial disclosure statements within the Department of Defense. The audit was made from November 1983 through March 1984 to determine if DoD Agencies, Departments and activities were complying with the financial disclosure provisions of the Ethics in Government Act of 1978 and DoD Directive 5500.7, "Standards of Conduct." These regulations require systematic reviews of the financial interests of current and prospective Government employees to determine if they can perform their duties without compromising the public trust. Over 36,000 confidential financial disclosure statements were filed by DoD employees in FY 1983.

The audit showed that, in most cases, ethics counselors did a good job reviewing the disclosure statements they received. However, other areas within the financial disclosure program needed administrative and internal control improvements. The results of the audit are summarized in the following paragraph, and the details, together with audit recommendations, management's comments and our response, are contained in Part II of this report. The complete text of management's comments is in Appendix B.

DoD components were neither adequately identifying personnel required to file disclosure statements nor monitoring disclosure statement processing. As a result, disclosure programs of Defense components were inconsistently implemented and did not ensure that all potential conflicts of interest were identified. We recommended that the General Counsel, Department of Defense revise DoD Directive 5500.7 to clarify procedures, improve internal controls, assign specific responsibilities, clarify filing criteria, and incorporate the financial disclosure provisions contained in the Federal Personnel Manual and the Ethics in Government Act of 1978. We also recommended that the General Counsel direct the DoD components' Standards of Conduct Counselors (ethics counselors) to review all official position descriptions and ensure that financial disclosure statements are on file for incumbents in positions that require disclosure statements (page 4).

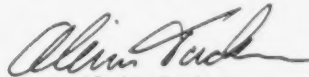
A draft of this report was provided to the General Counsel, Department of Defense on September 10, 1984. Comments on the

draft report were received on October 31, 1984. The Assistant General Counsel (Legal Counsel) (hereafter referred to as the Counsel) stated that intensive efforts are underway to replace DoD Directive 5500.7 with a revision incorporating the changes in the law and the recommendations included in the draft report. Counsel anticipated that the revised directive would be circulated for comment by the first week of December 1984. However, although Counsel concurred with Recommendation 1, it suggested that parts 1.c. and 1.d. be reworded to let DoD components exercise their responsibility for implementing the program and to clarify that the components need to improve upon existing filing criteria rather than establishing new criteria. We believe Recommendation 1.c. is appropriate as written. However, to clarify the intent of Recommendation 1.d., we reworded our recommendation as suggested. Counsel concurred with Recommendation 2 but did not provide the actions taken or planned, the completion dates for action already taken and the estimated dates of completion of planned actions.

This report identifies internal control deficiencies as defined by Public Law 97-255, Office of Management and Budget Circular A-123, and DoD Directive 5010.38. Sufficient controls were not in effect at the 22 activities we visited to ensure that personnel who should have been required to file financial disclosure statements actually filed such statements. Therefore, a copy of this report is being provided to the senior official responsible for internal controls at the activities listed in Appendix A.

DoD Directive 7650.3 requires that all audit recommendations be resolved within 8 months of the date of the final report. To comply with provisions of this directive, we request that you provide us with a more explicit position on Recommendation 2 within 60 days of the date of this report.

The courtesies extended to the staff during the audit are appreciated.



Alvin Tucker
Deputy Assistant Inspector General
for Auditing

cc:
ASA(FM)
ASAF(FM)
ASN(FM)
Director, DLA
DASD(Admin)

REPORT ON THE AUDIT OF
PROCEDURES AND CONTROLS FOR FILING
FINANCIAL DISCLOSURE STATEMENTS WITHIN
THE DEPARTMENT OF DEFENSE

PART I - INTRODUCTION

Background

Executive Order 11222 of May 8, 1965, and Title II of the Ethics in Government Act of 1978 (Public Law 95-521, as amended) require systematic reviews of the financial interests of current and prospective Government employees. The purpose of these reviews is to determine the ability of Government employees to perform their duties without compromising the public trust. DoD Directive 5500.7, "Standards of Conduct," January 15, 1977, incorporates the policies, procedures and responsibilities within DoD for filing and reviewing the financial disclosure statements of DoD employees. Chapter XIX of DoD Directive 5500.7 states that the following personnel are required to submit an initial and annual "Confidential Statement of Affiliations and Financial Interests" (DD Form 1555) unless expressly exempted:

A. All civilian DoD personnel paid at a rate equal to or in excess of the minimum rate prescribed for employees holding the grade of GS-16, including the Executive Schedule.

B. Officers of flag or general rank.

C. Commanders and deputy commanders of major installations, activities, and operations, as determined by the Heads of the DoD Components.

D. Board members of the Armed Service Board of Contract Appeals.

E. DoD personnel classified at GS-13 or above, or at a comparable pay level under other authority, and members of the military in the rank of lieutenant colonel, commander, or above, when the responsibilities of such personnel require the exercise of judgment in making a Government decision or in taking Government action in regard to activities in which the final decision or action may have a significant economic impact on the interests of any non-Federal entity.

F. Special Government employees.

G. Other DoD personnel who are required, with Civil Service Commission approval, to file such Statements.

The DoD General Counsel is the focal point for administering the financial disclosure program within the DoD. The General Counsel provides legal guidance and assistance to the Office of the Secretary of Defense, the Standards of Conduct Counselor for the Office of the Secretary of Defense, and the Standards of Conduct Counselors (ethics counselors) for all DoD components. During 1983, about 36,000 DoD civilians and military personnel filed DD Form 1555.

Objectives and Scope

The overall objective of the audit was to determine if DoD components were complying with the financial disclosure provisions of the Ethics in Government Act of 1978 and DoD Directive 5500.7. We specifically focused on whether:

- adequate Office of the Secretary of Defense guidance had been issued to ensure consistent implementation;
- procedures and controls had been established to ensure the timely and complete filing of financial disclosure statements; and
- management controls had been developed to preclude potential or apparent conflicts of interest.

This financial and compliance audit was made at 22 locations within the DoD (Appendix C) and included a review of requirements for the DD Form 1555 of 1,256 personnel and position descriptions of personnel who had not filed statements assigned to procurement and project management office positions in FY 1983.

The audit was performed from November 1983 through March 1984 and was made in accordance with generally accepted government auditing standards.

Prior Audit Coverage

The Office of Government Ethics, Office of Personnel Management, reviews agency ethics programs to include ensuring that confidential financial disclosure statements are filed. The Office of Government Ethics reviews at six DoD components during April through October 1983 resulted in recommendations to improve internal controls to ensure that all required statements are submitted properly. The Office of Government Ethics also recommended that DoD Directive 5500.7 be updated to reflect the enactment of the Ethics in Government Act of 1978. However, to date, the Directive has not been revised.

Office of the Assistant Inspector General for Auditing, Report No. 83-156, "Review of Policies, Procedures and Practices for

Operation of the Defense Science Board," July 7, 1983, addressed disclosure statements filed by appointees to the Defense Science Board and its task forces. The audit disclosed that requirements to submit financial disclosure statements were not being provided adequate management attention. A follow-up review of Defense Science Board operations by the Office of the Assistant Inspector General for Auditing, Report No. 84-013, November 16, 1983, indicated that management was now following existing guidance and ensuring that disclosure statements were filed by task force members in a timely manner. Our review disclosed problems similar to those discussed in the Office of Government Ethics and the Office of the Assistant Inspector General for Auditing reports.

PART II - FINDING AND RECOMMENDATIONSAdministration and Control of Financial DisclosuresFINDING

The administration and control of financial disclosure statements by DoD components did not always ensure that the required statements were completed, reviewed or monitored in accordance with financial disclosure regulations. We determined that 89 employees had not filed statements even though their position descriptions required them to do so. Another 86 employees had not filed because their position descriptions failed to include financial disclosure filing requirements. Nearly 71 percent of 230 newly appointed personnel reviewed had not submitted their initial disclosure statements for up to 11 months after commencing their service. These conditions occurred because DoD guidance on financial disclosure policies, procedures, and responsibilities was not comprehensive or definitive, and in many cases, neither supervisors nor ethics counselors were ensuring that all program requirements were met. As a result, financial disclosure programs within the Defense components were inconsistently implemented and did not ensure that all potential conflicts of interest were identified.

DISCUSSION OF DETAILS

Background. DoD Directive 5500.7 assigns ethics counselors the responsibility for reviewing financial disclosure statements. The requirement to file a disclosure statement must be incorporated in the employee's position description. In addition, all position descriptions must be reviewed at least annually to identify those positions that require statements. The directive, however, does not specify who should conduct the position description reviews. When a disclosure statement is required, both an initial and annual statement must be submitted. The ethics counselor should review initial disclosure statements prior to commencement of employee service. While we did not find any conflicts of interest, our audit disclosed weaknesses in internal controls over the above cited requirements. We also determined that certain provisions contained in the Federal Personnel Manual and the Ethics in Government Act of 1978 had not been incorporated into the DoD directive.

Identification of Personnel Required to File Annual Disclosure Statements. Sufficient controls were not in effect to identify all personnel who should have been required to file annual financial disclosure statements. At 15 of the 22 locations we visited, we reviewed position descriptions of nonfiling personnel working in procurement and project management offices. At 10 of the 15 locations, 89 employees did not file

statements, yet their position descriptions specifically required the statements to be submitted. We also identified 86 position descriptions (7 locations) having duties and responsibilities, (e.g., contract negotiation and source selection board membership) that we believe should have included financial disclosure filing requirements (Appendix A). In many cases neither supervisors nor ethics counselors were assuming the responsibility for reviewing position descriptions. Each of these instances was presented to and discussed with management officials at the activities where they occurred.

Central Listings. Chapter 734 of the Federal Personnel Manual requires personnel officers, in conjunction with ethics counselors, to develop systems to identify all positions and incumbents required to file disclosure statements. This provision, however, also had not been incorporated into the DoD directive. Most of the activities we audited had not developed adequate systems to identify employees required to file statements. Personnel officers and ethics counselors generally did not maintain corresponding listings of employees required to file statements. Eight of the 22 locations we visited did not maintain central listings. Twelve activities developed listings solely on input generated by supervisory personnel. Only two activities had developed systems that satisfactorily controlled disclosure statement submissions. Central lists of personnel required to file statements should be maintained and annual changes should be monitored to improve internal controls.

Financial Disclosure Management. The lack of comprehensive and definitive DoD guidance caused inconsistencies in financial disclosure management. For example, the Abrams Tank System (M-1) Program Office at the U.S. Army Tank-Automotive Command listed 72 required filers in 1981, only 19 in 1982, and 30 in 1983. The Deputy Program Manager responsible for identifying filers changed during this period, and as a result, the interpretations of service filing requirements varied. At least 14 M-1 program personnel who were no longer required to file in FYs 1982 or 1983 had duties and responsibilities similar to incumbents who were required to file disclosure statements by Tank-Automotive Command's Bradley Fighting Vehicle Systems Program Office. In another instance, we found a Navy Project Officer who felt that only he should be required to file since he made all the final decisions in his office. On the other hand, we noted an instance in which an individual who could influence the decision making process did not file even though he supervised three subordinates who were required to submit disclosure statements.

These inconsistencies support the need for enhanced DoD guidance that requires DoD components to designate an individual responsible for conducting initial and annual reviews of position descriptions. We believe that the ethics counselor should be the designee with the primary oversight responsibility of ensuring

that all statements are complete and filed within required time frames. In addition, definitive filing criteria should be established to require disclosure statements from all personnel participating in decision making processes that have a significant impact on non-Federal entities. All individuals who can influence the decision making process of supervised personnel who submit statements should also be required to file.

Conflicts of Interest. Failure to properly administer, control and review the financial disclosures of DoD employees can result in undetected or unresolved conflicts of interest. At the United States Army Missile Command, Redstone Arsenal, we identified eight employees who had each purchased stock of the same engineering firm in 1983. This corporation was included on the list of DoD contractors doing business with the Missile Command. Since these employees were generally in positions in which their decisions could influence contract awards, we discussed their financial disclosure statements with the Command ethics counselor. The Command ethics counselor was cognizant of the situation and stated that he had tried, unsuccessfully, to convince Army criminal investigators to initiate an investigation. Subsequent to our visit, we referred the details of this potential conflict to the Defense Criminal Investigative Service.

Initial Financial Disclosure Statements. Supervisors and ethics counselors were generally not assuming responsibility for ensuring that initial statements were obtained from incumbents upon their appointment to positions requiring financial disclosure. We selected 230 annual disclosure statements submitted by employees appointed to positions since October 31, 1982.^{1/} Yet, out of these 230 employees, 163 (70.9 percent) had not submitted initial disclosure statements prior to commencing their service (Appendix A). The first disclosure statements filed by these appointees were their annual statements and were filed from 1 to 11 months after their initial appointment.

Reviews By Ethics Counselors. Ethics counselors generally did a good job reviewing the disclosure statements they received. We reviewed 1,256 annual confidential financial disclosure statements at 22 locations. We noted that only 92 of these were not filed on time and that 68 were incomplete (Appendix A). All but 10 of the late statements were filed within 30 days of their due date. The omissions on the annual statements were generally minor and did not significantly affect their validity.

^{1/} Annual financial disclosure statements are required by October 31 of each year.

Ethics counselors, however, were not receiving all statements. We reviewed 248 disclosure statements at the Naval Air Systems Command and Naval Sea Systems Command and determined that 97 statements were not furnished to and reviewed by the respective Commands' ethics counselors. Local regulations at the commands allowed supervisors to retain the disclosure statements without the ethics counselor's review if no personal affiliations were listed. This guidance was contrary to DoD and Secretary of the Navy guidance and did not provide a method for verifying that financial disclosure statements had been filed.

Financial Disclosure Statement Filing Criteria: DoD Directive 5500.7 provides that:

Heads of DoD Components, or their designees, may determine that the submission of statements is not necessary for certain positions because of the remoteness of any impairment of the integrity of the Government and the degree of supervision and review of the incumbents' work.

However, the Directive does not include a requirement to document and approve such decisions. At Headquarters, Defense Logistics Agency, for example, 79 contract and procurement personnel were exempt from filing because in their supervisors' judgement they did not hold positions that would influence management decisions. However, these exemptions were not documented. While these exemptions may have been appropriate, we believe the "Exclusion of Positions" criteria should be revised to require documentation and approval in order to acknowledge that position descriptions have been reviewed and that management decisions pertinent to the necessity to file disclosure statements have been made.

Finally, the Ethics in Government Act of 1978 requires all personnel GS-16 and above and their military equivalents to file a financial disclosure statement on Standard Form 278 regardless of the employee's duties and responsibilities. Similar requirements had not been incorporated in the DoD directive. The directive requires these employees to file financial disclosure statements on DD Form 1555. Disclosure statements required by the Ethics in Government Act are more stringent than those required by the DoD directive. Although we found that the correct form was being filed by personnel GS-16 and above, the directive should be revised to reflect the provisions of the Act.

RECOMMENDATIONS FOR CORRECTIVE ACTION

We recommend that the General Counsel, Department of Defense:

1. Revise DoD Directive 5500.7 to require DoD components to:

a. Designate an individual to be responsible for conducting initial and annual reviews of position descriptions.

b. Assign program oversight responsibilities to ethics counselors and require them to ensure that financial disclosure statements are complete and submitted within required timeframes.

c. Direct personnel officers, in conjunction with ethics counselors, to develop systems to identify all positions and incumbents required to file disclosure statements, maintain listings of these positions and incumbents, and monitor changes.

d. Improve filing criteria that to make it clear that:

(1) Disclosure statements should not only be filed by those who make final decisions but also by those who participate in the decision making process.

(2) Disclosure statements should be filed by individuals who can influence the decision making process of supervised personnel required to submit statements.

e. Document and approve all determinations to eliminate certain positions from disclosure requirements based on "Exclusion of Positions" criteria.

f. Furnish all financial disclosure statements to their appropriate ethics counselor for review regardless of whether or not personal affiliations are listed.

g. Use the Standard Form 278 to process the financial disclosure statements of all personnel GS-16 and above and their military equivalents.

2. Direct the DoD components Standards of Conduct Counselors (ethics counselors) to review all official position descriptions and ensure that financial disclosure statements are on file for incumbents in positions that require disclosure statements.

MANAGEMENT COMMENTS

The Assistant General Counsel (Legal Counsel) (hereafter referred to as Counsel) provided comments (Appendix B) to our draft report. In response to Recommendation 1, Counsel agreed that the

directive, January 15, 1977, was obsolete in several significant respects and the publication of an appropriately revised directive was necessary. Counsel stated that efforts were underway to replace DoD Directive 5500.7 with a revision incorporating the changes in the law and the recommendations made in the report. Circulation of the revised directive for comment was anticipated by the first week of December 1984.

In specific response to Recommendations 1.c. and 1.d., Counsel suggested some minor changes in the way we described certain tasks. For example, in Recommendation 1.c., Counsel questioned the propriety of including in the directive our statement that personnel officers develop identification systems. Counsel felt that while the directive should prescribe "what" is to be done with respect to the financial disclosure reporting system, it should be the responsibility of the components to designate "who" will monitor the implementation. Counsel suggested that Recommendation 1.c. be reworded as follows: "Direct components to develop systems to identify all positions and incumbents. . . ." In response to Recommendation 1.d., Counsel agreed that there has been an inconsistent application of the filing criteria. Counsel felt that the filing criteria needed to be clarified and not reestablished as indicated in our recommendation. Counsel suggested that Recommendation 1.d. begin with "Improve filing criteria to make it clear that: . . ."

Counsel concurred with Recommendation 2 but did not indicate how it planned to implement this recommendation.

AUDIT RESPONSE TO MANAGEMENT COMMENTS

Regarding Counsel's response to Recommendation 1.c., we believe our recommendation is appropriate as written. We do not believe that requiring DoD components to direct personnel officers, in conjunction with ethics counselors, to develop systems to identify all positions and incumbents required to file disclosure statements will restrict components from tailoring their programs to meet their respective requirements and preferences. Chapter 734 of the Federal Personnel Manual specifically requires personnel officers, in conjunction with ethics counselors, to develop such systems. However, this provision was not in the DoD directive and our audit showed that only two of 22 activities we visited had developed systems that satisfactorily controlled disclosure statement submissions. The revision to DoD Directive 5500.7 should at least point out the Federal Personnel Manual provision.

Regarding Counsel's suggested change to Recommendation 1.d., we have reworded the recommendation. Counsel's revision to the directive in accordance with our recommendation should provide the corrective measures to the conditions cited in this report.

SUMMARY OF AUDIT OF 1963 FINANCIAL DISCLOSURE STATEMENTS BY ACTIVITY

	Annual Statements			Initial Statements			Statements Not Submitted	
	Number Reviewed	Filed Late	Incomplete	Verifications Attempted	Filed	Not Filed	Required By Position Description	Necessary Per Position Description Duties
Office of Secretary of Defense								
Office of Under Secretary of Defense, Research & Engineering	53	9	0	16	0	16	3	0
Department of the Army								
Material Development and Readiness Command	44	11	0	4	0	4	1/	
Missile Command	240	6	10	16	0	16	1/	
Tank-Automotive Command	230	5	13	31	5	26	23	3
Department of the Navy								
Naval Air Systems Command	132	15	11	42	31	11	3	0
Naval Sea Systems Command	116	7	17	26	20	6	10	22
Aviation Supply Office	14	0	0	1	0	1	1/	
Navy Regional Contracting Center-Philadelphia	15	8	8	2	0	2	1/	
Department of the Air Force								
Office of Deputy Chief of Staff, Research Development and Acquisition	2/						9	8
Headquarters, Air Force Logistics Command and 2750 Air Base Wing	31	2	0	5	0	5	4	0
Headquarters, Air Force Systems Command	15	0	0	3	0	3	5	0
Aeronautical Systems Division	160	12	4	45	5	40	22	30
Detachment 1, 76 Airlift Wing	3	0	0	0	0	0	0	0
Office of Scientific Research	6	0	0	1	0	1	0	0

1/ Position descriptions were not reviewed.

2/ Financial disclosure statements were not filed.

SUMMARY OF AUDIT OF 1983 FINANCIAL DISCLOSURE STATEMENTS BY ACTIVITY (CONTINUED)

Defense Agencies	Annual Statements			Initial Statements			Statements Not Submitted		
	Number Reviewed	Filed		Verifications Attempted	Not Filed		Required By Position Description	Necessary Per Position Description	Duties
		Late	Incomplete		Filed	Not Filed			
Headquarters, Defense Logistics Agency	24	7	0	9	0	9	9	18	
Defense Electronics Supply Center	22	4	0	10	2	8	0	0	
Defense Fuel Supply Center	30	0	1	6	3	3	1	3	
Defense Industrial Supply Center	26	0	1	0	0	0	1/		
Defense Personnel Support Center	55	1	3	1	0	1	1/		
Defense Contract Administration Services Region-Philadelphia	20	0	0	3	0	3	1/		
Defense Supply Service Washington, DC	20	5	0	9	1	8	0	2	
TOTALS	1,256	92	68	230	67	163	89	86	

1/ Position descriptions were not reviewed.



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

WASHINGTON, D.C. 20301

31 OCT 1984

MEMORANDUM FOR ALVIN TUCKER, DEPUTY ASSISTANT INSPECTOR GENERAL
FOR AUDITING

SUBJECT: Draft Report on the Audit of Procedures and Controls
For Filing Financial Disclosure Statements Within
the Department of Defense (Project 4FH-004) -

Your recent memorandum forwarded the subject Draft Report, dated September 10, 1984. You asked for the comments of this office to permit the consideration of our views in the preparation of the final report.

The auditors found that the DoD guidance on standards of conduct, DoD Directive 5500.7, dated January 15, 1977, is obsolete in several significant respects. The corrective action recommended is the publication of an appropriately revised Directive. We concur both in the finding and the proposed remedy.

The new reporting system established by the Ethics in Government Act of 1978 has been fully implemented in all of the DoD components. Most of the components have updated their standards of conduct regulations to include this requirement even though no revision to the Directive has been published. Thus, the absence of a current Directive has not prevented the components from managing their own programs.

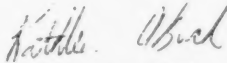
A proposed revision of the DoD Directive 5500.7, incorporating the changes required by the Ethics Act, was circulated for comment in September, 1979. Comments from offices analyzing the draft indicated considerable diversity of opinion regarding the acceptance of gifts and gratuities and other matters of conduct. As this portion of the regulation is based on an Executive Order and on implementing regulations of the Office of Government Ethics (OGE), further action was deferred, pending publication of the OGE regulation.

The Office of Government Ethics has published regulations covering financial reporting (Part 734, title 5, Code of Federal Regulations) and postemployment rules (Part 737), but has not yet updated the basic regulation (Part 735). We have been advised by

OGE that no revision of Part 735 is imminent and have resumed work on our Directive.

Intensive efforts are underway to replace DoDD 5500.7 with a revision incorporating the changes in the law and the suggestions included in your Report. It is anticipated that it will be circulated for comment the first week of December, 1984.

Although we concur in the essential aspects of the Draft Report, there are some differences regarding details that should be explored. For example, we doubt that a revised Directive can cause all of the beneficial consequences that the auditors expect. Most of these differences in viewpoint will be resolved by analyzing the results after the corrective action is taken. Additional comments on some of the details in the report are included in the attachment.



Kathleen A. Buck
Assistant General Counsel
(Legal Counsel)

Attachment

cc: Mr. Briskin

OFFICE OF GENERAL COUNSEL COMMENTS
ON DRAFT OF PROPOSED AUDIT REPORT:REPORT ON THE AUDIT OF
PROCEDURES AND CONTROLS FOR FILING
FINANCIAL DISCLOSURE STATEMENTS WITHIN
THE DEPARTMENT OF DEFENSE

PROJECT 4PH-004

1. Assignment of Review Responsibility. The finding on p. 5 of the Draft Audit Report relates statistics showing that numerous employees failed to file financial statements ("Confidential Statement of Affiliations and Financial Interests," DD Form 1555), even though their position descriptions required them to do so, and by others whose position descriptions should have included filing requirements. It also was noted that a majority of a group of "newly appointed personnel reviewed had not submitted their initial disclosure statements for up to 11 months after commencing their service."

4

The reported facts resulted in the following conclusion:

These conditions occurred because DoD guidance on financial disclosure policies, procedures, and responsibilities was not comprehensive or definitive, and in many cases, neither supervisors nor ethics counselors were ensuring that all program requirements were met. (Emphasis added.)

The background discussion on pages 6 and 7 points out that the Directive assigns responsibility for review of financial disclosure statements, it specifies that the filing requirement be included in the job description, and requires that there be an annual review to identify positions to be included. It also was noted that the Directive did not specify who should conduct the position description reviews, leading to this conclusion:

4 and 5

Because DoD Directive 5500.7 did not specify who should review position descriptions, in many cases neither supervisors nor ethics counselors were assuming this responsibility.

Comment:

We question the propriety of including in a DoD Directive the suggested detailed guidance, that is, identifying "who" will conduct reviews. DoD Directives, according to the "Directive on Directives" (DoDD 5025.1), "publish Secretary of Defense

decisions relating to policies, plans, programs, charters, delegations of authority or other major actions." It is customary in DoD directives to describe programs in broad terms, giving the goals to be accomplished, with the components then developing necessary detailed implementation. This approach allows the program to be tailored to the unique requirements and organizational preferences of each component.

Responsibilities for the administration of the financial disclosure reporting program are shared. Although the Audit Draft accurately describes the General Counsel as the "focal point," the Heads of the Components have important implementing responsibilities (Par. XVI. A.):

The Head of each DoD Component shall designate a Standards of Conduct Counselor and one or more Deputy Counselors. Those designated shall be responsible for providing advice and assistance to their Components and to the personnel of those Components on all questions arising from the operation and implementation of this Directive. They shall also be responsible for the proper review, including audits, coordination, and advice regarding all standards of conduct problems. (Emphasis added.)

While the Directive prescribes what is to be done with respect to the financial disclosure reporting system, we suggest that it should be the responsibility of the components to designate who will monitor the implementation. The Heads of the Components are to designate Standards of Conduct Counselors. These Counselors have review and audit responsibility. Thus, more detailed implementation in the Directive is not necessary because ultimate responsibility is appropriately placed on the heads of the individual components.

2. Inconsistent Application of the Filing Criteria. Certain positions subject to the requirement to file the DD Form 1555 are identified by grade or rank. Others are subject to a discretionary determination. (The entire requirement, Par. XIX of the Directive, is set out on pages 1 and 2 of the Draft Report.) According to the findings on page 8 of the Draft, the application of these discretionary criteria has been inconsistent. The resulting conclusion:

The lack of comprehensive and definitive DoD guidance caused inconsistencies in financial disclosure management.

In the pending revision to DoDD 5500.7 there will be a conscientious effort to improve the guidance on this issue. However, the following points must be recognized:

- These criteria implement the standards set out in the OGE regulations (5 CFR 735.403) and in Executive Order 11222. Any further elaboration by executive branch offices must be within those guidelines.

- The present criteria in the regulation have been challenged by persons who objected to being placed under the filing requirement. However, they have not been described as unclear or ambiguous.

- The examples of noncompliance, cited in the Draft Report's discussion of this issue, may be more the product of deliberate evasion and inadequate component supervision than by deficient guidance in the DoD Directive.

3. Recommendations for Corrective Action. This office concurs with the proposed remedial action (discussion starting on page 12 of the Draft Audit Report). However, consistent with the above comments, we suggest some minor changes in the way certain tasks are described:

- 1.a. - Concur as written.

- b. - Concur as written.

- c. It is suggested that this item be reworded as follows: "Direct components to develop systems to identify all positions and incumbents . . ." etc.

- d. It is suggested that this item begin with: "Improve filing criteria to make it clear that: . . ." etc. After this minor change we concur with the balance as written.

- e. Concur as written.

- 2. Concur as written.

ACTIVITIES VISITEDOffice of the Secretary of Defense

Office of Under Secretary of Defense for Research and
Engineering, Washington, DC
Office of General Counsel, Department of Defense, Washington, DC

Department of the Army

Material Development and Readiness Command, Alexandria, VA
Missile Command, Redstone Arsenal, AL
Tank-Automotive Command, Warren, MI

Department of the Navy

Naval Air Systems Command, Arlington, VA
Naval Sea Systems Command, Arlington, VA
Aviation Supply Office, Philadelphia, PA
Navy Regional Contracting Center, Philadelphia, PA

Department of the Air Force

Office of the Deputy Chief of Staff, Research, Development and
Acquisition, Washington, DC
Air Force Logistics Command, Wright-Patterson Air Force Base
(AFB), OH
Air Force Systems Command, Andrews AFB, MD
Aeronautical Systems Division, Wright-Patterson AFB, OH
2750 Air Base Wing, Wright-Patterson AFB, OH
Detachment 1, 76th Airlift Wing, Bolling AFB, Washington, DC
Office of Scientific Research, Bolling AFB, Washington, DC

Defense Agencies

Defense Logistics Agency, Alexandria, VA
Defense Electronics Supply Center, Dayton, OH
Defense Fuel Supply Center, Alexandria, VA
Defense Industrial Supply Center, Philadelphia, PA
Defense Personnel Support Center, Philadelphia, PA
Defense Contract Administration Services Region, Philadelphia, PA
Defense Supply Service, Washington, DC

14 SEP 1984

Honorable Charles H. Percy
 Chairman, Subcommittee on Energy, Nuclear
 Proliferation, and Government Processes
 Committee on Governmental Affairs
 United States Senate
 Washington, DC 20510

Dear Mr. Chairman:

On June 11, 1984, you asked my office to conduct a review of the "Reporting Procedures on Defense Related Employment," (DoD Directive 7700.15) and provide answers to 10 related questions. The answers to your questions are enclosed. The answers were based on a review of DoD implementing directives of Public Law 91-121, Section 410, interviews with appropriate DoD officials and review of 132 Employment Forms, DD 1787, filed by prior DoD employees for FY 1981. Our work disclosed just one instance when a potential conflict of interest was identified through this reporting process.

As we advised you on July 3, 1984, we contacted General Accounting Office personnel to coordinate our combined efforts on this project.

COORDINATION:

SIGNED

ASD: (MILITARY)
SIGNED
 General Counsel

Enclosure

DIST:

IG

AIG-AUD

2

2

Sincerely,

SIGNED

Joseph H. Sherick
 for Joseph H. Sherick
 Inspector General

AIG-AUD/s.halpern/bes/49155/8/21/84

Responses to "Reporting Procedures on
Defense Related Employment"

Question No. 1. Is DD Form 1787 properly drafted to serve its statutory purpose?

The legislative intent of Public Law 91-121 which resulted in DoD Directive 7700.15, is that it provides a reporting mechanism to help protect the Government against conflict of interest violations. The design of the form quite closely follows the wording of the law.

Question No. 2. To what extent are present employees aware of relevant post employment restrictions?

DoD components have set up procedures to inform all applicable employees of the postemployment procedures. DoD Directive 7700.15 dated October 30, 1970, "Reporting Procedures on Defense Related Employment," implemented the provisions of Public Law 91-121, Section 410. The Directive requires that all DoD components establish procedures whereby all applicable employees are made aware of Public Law 91-121. The Directive further stipulates that each person be provided a copy of this Directive or the DoD component's appropriate implementing regulation. A supply of DD Forms 1787 is to be provided or made available to each person. For military personnel being separated or retired, this notification is to be included in their exit interviews or separation counseling procedures. Civilian employees are also informed at the time of their separation of the reporting requirement. Each of the Military Services and Defense Agencies has issued their respective regulations and instructions which implement the guidance of DoD Directive 7700.15.

The Military Services provide to retiring or separating officers a variety of references, pamphlets and handbooks that outline prohibitive actions and restrictions associated with post-DoD employment. Each officer is either provided copies of applicable regulations which outline reporting requirements on post-DoD employment or is asked to read subject regulations. The Navy's retirement orientation includes a briefing, given approximately 18 months prior to retirement, which notifies the officers of their reporting requirement. Each of the Military Services offers to their personnel, legal counseling which addresses questions concerning post-DoD employment restrictions and conflict of interest laws. The Air Force Accounting and Finance Center sends annual notification to all military retirees within the past 3 years alerting them of the requirement to report their Defense-related employment.

Enclosure
Page 1 of 5

New DoD employees who are subject to the reporting requirements of Public Law 91-121 are notified during their entrance orientation. DoD employees who subsequently become subject to the reporting requirement by virtue of a promotion or step increase are notified at that time. One Army command routinely stamps the personnel files of civilian personnel who become subject to the provisions of Public Law 91-121. This procedure facilitates the personnel office in ensuring those individuals are made aware of the reporting requirement. We have not questioned individual employees as to the effectiveness of these procedures. It is our understanding that the General Accounting Office will circularize selected employees.

Question No. 3. Is it filled out accurately, completely, and in a timely manner by former DoD employees who become employed by defense contractors?

A review of 132 DD Forms 1787 submitted to the three Services and the Defense Logistics Agency showed data requested on the form were generally filled in by the reportee. However, several answers were either incomplete or insufficient to be useful to the reader in detecting potential conflict of interest violations. As an example, the form required the reportee to provide a brief description of work performed during the last 3 years of service with DoD and also a brief description of work performed for Defense contractor employer, however, it was sometimes difficult to relate the type of work performed to a specific defense contractor or program. Reportees generally submitted their forms within the target date timeframe. However, procedures were in effect whereby late submissions are compiled, reviewed and submitted to Congress by April 21 of each year.

Question No. 4 How many DD Forms 1787 have been filed in the past three years?

The number of DD Forms 1787 filed in the past 3 fiscal years was as follows:

DoD Component	Fiscal Year		
	1983	1982	1981
Army	296	430	259
Navy	354	549	295
Air Force	1,494	1,578	1,245
OSD/Office of Joint Chiefs of Staff	60	38	25
Defense Agencies	36	42	21
Total	2,240	2,637	1,845

Question No. 5. How does DoD ensure that all those required to file do, in fact, file? Does an initial submission trigger some type of alert when subsequent required submissions are not made?

There is no mechanism within DoD to monitor individual compliance with Public Law 91-121 filing requirements either for initial filing or subsequent submissions after the initial filing. Our review of 132 forms submitted to the three Services and the Defense Logistics Agency for the first year of separation from DoD in FY 1981 disclosed that the subsequent year filing by the same employees declined to 55 percent in FY 1982 and 28 percent in FY 1983. There was no followup by DoD to determine the reasons for the decline.

Each year the Department of Defense requests each of the covered contractors to alert present and past employees of the requirement to report their post-DoD employment. There is no reporting requirement placed on the contractors by Public Law 91-121.

The Air Force had the most favorable percentages for individuals submitting reports in their second (FY 1982) and third year (FY 1983) of their post-DoD employment--82 percent and 58 percent, respectively. The percentages for the Army and Navy were not as favorable for subsequent filing in the second and third years. Those percentages were 40 percent and 10 percent, respectively. Of the 132 forms we reviewed, there were only four instances where an individual filed the first and third years--failing to file the second year--while their employment remained with the same company.

Question No. 6. Who reviews these forms upon submission, and what is the objective of such a review?

Each of the Military Services and the Defense Logistics Agency had internal procedures for reviewing DD Forms 1787. In the Army, former military officers submit their forms to the Retired Officers Affairs Office, Military Personnel Center, where they are reviewed by personnel specialists. Former and present Army civilians submit their forms to their command level civilian personnel office where they are reviewed. In the Navy, former military officers submit their forms to the Naval Military Personnel Command. Former and present Navy civilians submit their forms to the Civilian Personnel Office, Chief of Naval Operations, where they are reviewed by personnel specialists in conjunction with General Counsel office. In the Air Force, forms of former military officers and civilians, other than those with the Office of the Secretary of the Air Force, are submitted directly to the Air Force Accounting and Finance Center where they are reviewed by financial system specialists. Forms for present and former civilians of the Office of the Secretary of

the Air Force are submitted through the Air Force General Counsel office to the Finance Center where they are reviewed. At the Defense Logistics Agency, the General Counsel's office receives and reviews all submitted forms.

The three Services and the Defense Logistics Agency reviewed the forms to determine if the reportee is still within the 3-year filing period and if all spaces on the form are filled in. Generally, the forms were filled out by the reportee. For the FY 1983 reporting, several hundred forms were returned to reportees because of either incomplete data or filing beyond the 3-year filing period. The Retired Officer Affairs Offices and Civilian Personnel Offices generally maintained files which documented their correspondences to the reportees.

Reviews by the Army and Air Force did not go beyond the applicability and completeness stage. The Navy and Defense Logistics Agency General Counsel offices stated that reviews are made for potential conflict of interest violations. For the filing periods of FY 1981 through FY 1983, there was just one case questioned by the Navy for possible conflict of interest violation. This case was referred to the Chief of Naval Material.

Question No. 7. Is there any effort to verify the accuracy and completeness of the information contained in such forms?

Other than the reviewer's scrutiny of the submitted forms for confirmation of the filing period and that all applicable spaces are filled, there were no other procedures in effect within the three Services or the Defense Logistics Agency to verify the accuracy or completeness of submitted data.

We were informed that there are other mechanisms available within DoD which assist in identifying potential conflict of interest violations. For example, each retired regular officer is required to maintain a current reporting status of his employment with his Service. Retired officers are required to file a DD Form 1357, Statement of Employment. This form enables DoD to determine whether such officers are engaged in activities prohibited by law or regulation, including those that could result in the loss or reduction in retired pay. Internal procedures were also utilized that required former military and civilian employees to sign a register identifying them as contractors' representatives when these individuals contacted DoD components.

Question No. 8. Have any violation of this reporting mechanism ever been identified? If so, please identify any actions taken.

Enclosure
Page 4 of 5

We found no instances where violations of this reporting mechanism were identified.

Question No. 9. What is done within DoD to maintain an updated list of contractors whose employment triggers a reporting obligation under Directive 7700.15.

All procurement actions awarded over \$25,000 are recorded on a DD Form 350, Individual Procurement Action Report. These forms are input into a mechanized system and maintained on a DoD-wide basis. Annually, the system is queried to list all Defense contractors meeting the \$10 million negotiated threshold requirement. Submitted DD Forms 1787 are grouped by the listed contractors.

Question No. 10. Do you have any recommendations as to how these forms might be made more useful?

Public Law 91-121 was enacted in 1969. Since 1969 its reporting criteria have not changed. For example, the threshold salary established for reporting is \$15,000 per year paid by a defense contractor. We suggest that the dollar reporting level be increased to include those whose grade levels or pay by a contractor would be indicative of positions of responsibility. This coupled with a more effective form, which the law allows the Secretary to prescribe, and mandated reviews of the individual submissions should make the program more useful to determine conflicts of interest.



OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON D.C. 20301

1985 MAY -9 PM 1:50

May 9, 1985

Honorable William S. Cohen
United States Senate
Washington, D. C. 20510

Dear Senator Cohen:

Enclosed is the answer to a question you asked Mr. Alvin Tucker,
Deputy Assistant IG for Auditing, DoD, April 24, during his
appearance before the Committee on Governmental Affairs Subcommittee
on Oversight of Government Management.

Sincerely,

Jane Legates
Jane Legates
Legislative Research &
Information Assistant

Enclosure
22

INSERT FOR THE RECORD						
HOUSE	APPROPRIATIONS COMMITTEE	HOUSE	ARMED SERVICES COMMITTEE	HOUSE	OTHER	
SENATE		SENATE		X SENATE		
HEARING DATE	TRANSCRIPT PAGE NO.	LINE NO.	INSERT NO.			
April 24, 1985	121	5	1	Governmental Affairs		

Senator Cohen. How much was the fine, just by way of mention?

Mr. Tucker: The amount of the fine imposed in this case was \$30,000. In addition, there was a civil settlement with the Federal government in the amount of \$121,459 plus \$30,009 in interest and the contractor agreed not to pursue claims totalling \$160,000 outstanding under the contract in question which was terminated.



(REPRINT WITH CHANGES THROUGH
6/14/76 INCORPORATED)

October 30, 1970 #

NUMBER 7700.15

ASD(M&RA)

Department of Defense Directive

SUBJECT Reporting Procedures on Defense Related Employment

References: (a) Public Law No. 91-121, sec. 410 (Nov. 19, 1969)

(b) DoD Directive 5500.7, "Standards of Conduct,"

August 8, 1967

(c) Public Law No. 94-273, April 21, 1976

I. PURPOSE AND SCOPE

This Directive:

A. Establishes criteria and prescribes the procedures to be followed by certain (1) former and retired military officers and former civilian officers and employees of DoD presently employed by defense contractors, and (2) former civilian officers and employees of Defense contractors presently employed by the DoD in submitting employment reports in compliance with reference (a). Failure to file required reports is punishable by a maximum of 6 months imprisonment, or a fine of not more than \$1,000 or both.

B. Assigns responsibilities for monitoring the Program within the Department of Defense.

II. APPLICABILITY

The provisions of this Directive apply to all elements of the Department of Defense, including the Office of the Secretary of Defense, the Military Departments, and the Defense Agencies, and to certain present and former military and civilian personnel of the Department of Defense, including employees of nonappropriated fund activities.

III. TERMS AND GENERAL GUIDANCE

A. "Employed" or "employment," is used in a broad sense to include services performed as a consultant or otherwise either for a defense contractor or the DoD.

#First amendment (Ch 3(REPRINT), 6/14/76)

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7700.15

B. Retired military officers, former military officers and former civilian officers and employees of the DoD are included:

1. If they are "employed" by a defense contractor as a consultant or otherwise,
2. If they represented a defense contractor at a hearing, trial, appeal, or other action in which the U.S. was a party and which involved services and materials provided or to be provided to the DoD by such contractor, or
3. If they represented a defense contractor in any transaction with DoD involving services or materials provided or to be provided by such contractor to DoD.

C. "Defense contractor" means any individual, firm, corporation, partnership, association, or other legal entity that enters into a contract directly with the DoD to furnish services or materials to DoD. It thus excludes subcontractors. Also, a subsidiary of a large corporation may be a separate legal entity and contract directly with the DoD in its own name. In such a case the "defense contractor" would be the subsidiary, not the parent corporation. Thus, only the dollar amount of contracts awarded by the DoD to a subsidiary contracting with DoD in its own name during a fiscal year would be considered in determining whether a person employed or formerly employed by it is required to report.

D. No person is required to file a report for any fiscal year during which the defense contractor by whom he is or was employed received less than \$10,000,000 in contracts awarded by DoD. For the purpose of this Directive "contracts awarded" means contracts awarded by negotiation only, including the net amount of modifications to or options exercised under such contracts. All transactions under \$10,000 each are excluded. Thus, if a person was employed by a defense contractor during a fiscal year in which the contractor received from the DoD \$8,000,000 in negotiated contract awards and \$2,000,000 in contracts awarded by formal advertising, the person would not have to report his employment for that year.

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E. "Services and materials" means either services or materials, or services and materials, and includes construction. Therefore a company that performs construction under contracts with DoD is a "defense contractor" under this section.

" F. "Fiscal Year" means a year beginning on October 1, and ending
" on September 30 of the next succeeding year; it is designated by
" the year in which it ends. For example, fiscal year 1977 began
" on October 1, 1976 and ends on September 30, 1977.

G. For the purposes of these reporting requirements, a "retired military officer" is any officer entitled to receive military retired pay, even though such pay may be waived. A "former military officer" includes Reserve officers not on active duty.

H. For the purposes of these reporting requirements, "former DoD civilian officer or employee paid at a rate equal to or greater than the minimum rate (at such time) for a grade GS-13" includes former wage board employees, former employees in the lower General Schedule grades, Public Law 313 categories, consultants, and persons in the executive levels, whose rates of pay equaled or exceeded the amounts specified in paragraph 4(c) of enclosure 1.

IV. REPORTING PROCEDURES

A report prepared and forwarded as prescribed in enclosure 1 shall be submitted not later than February 15 following the close of each fiscal year, by the following categories of individuals:

A. Any former or retired military commissioned officer who

1. At the time of release from active duty or retirement was serving on active duty as a major or lieutenant commander, or above; and
2. Had served on extended active duty for ten or more years; and
3. During any part of any fiscal year beginning with fiscal year 1971.

a. Is employed by or performed services for a defense prime

3

*Second amendment (Ch 3(REPRINT), 6/14/76)

Oct. 30, 70 *
7700.15

contractor, who, during such year, received \$10,000,000 or more in defense contract awards, and

b. Is employed by the defense prime contractor at a salary rate of \$15,000 or more per year.

B. Any former DoD civilian officer or employee (including consultants and part-time employees) who:

1. At any time during the 3-year period immediately preceding the termination of last employment with DoD was paid at a rate equal to or greater than the minimum rate (at such time) for a grade GS-13; and

* 2. During any part of any fiscal year *

a. Is employed by or performed services for a defense prime contractor who, during such year received \$10,000,000 or more in defense contract awards, and

b. Is employed by the defense prime contractor at a salary rate of \$15,000 or more per year.

C. Any DoD civilian officer or employee (including consultants and part time employees) who:

* 1. During any part of any fiscal year is employed by DoD at a salary rate equal to or greater than the minimum rate for a grade GS-13; and *

2. Was previously employed by or performed services, during any fiscal year, for a defense prime contractor who, during such year, received \$10,000,000 or more in defense contract awards; and

3. Was employed by the defense prime contractor at a salary rate of \$15,000 or more per year.

D. The following categories of persons are exempt from the reporting requirements:

1. Retired military officers, former military officers, and

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7700.15

former civilian officers and employees are not required to file a report of employment with a defense contractor for such employment during a fiscal year that begins 3 years or more after their extended active duty or employment with the DoD terminated.

2. DoD civilian officers and employees are not required to file a report for a fiscal year on account of previous employment with a defense contractor if such employment was terminated three or more years prior to the beginning of such fiscal year.

E. Reports submitted in accordance with this Directive will be forwarded as follows

1. Retired military officers, and former military officers - to the Secretary of the Military Department of which they are or were a member.
2. Former civilian officers and employees - to the Secretary of Military Department, or the Director of the Defense Agency by which they were employed. In the case of civilian officers or employees of the Office of the Secretary of Defense or the Joint Chiefs of Staff, - to the Deputy Assistant Secretary of Defense (Administration), OASD(C).
3. DoD civilian officers or employees - to the Secretary of the Military Department, or the Director of the Defense Agency by which employed, or in case of civilian officers or employees of the Office of the Secretary of Defense or the Joint Chiefs of Staff to the Deputy Assistant Secretary of Defense (Administration), OASD(C).

V. ACTIONS REQUIRED

- A. The Assistant Secretary of Defense (Comptroller) will prepare a listing of the defense contractors who received \$10,000,000 or more in negotiated contracts awarded in each fiscal year and cause that listing to be published in the Federal Register not later than December 15 following the end of the fiscal year.

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7700.15

B. The Assistant Secretary of Defense, Manpower and Reserve Affairs will:

1. Receive the lists and reports submitted as provided in subsection VII. B., below. A copy of such reports will be maintained for 3 years and will be available for public inspection at all times during normal working hours; and
2. Submit not later than March 31 of each calendar year a letter transmitting to the President of the Senate and the Speaker of the House of Representatives a list prepared in accordance with the format prescribed in enclosure 2 of the names of all persons who have filed such reports for the preceding fiscal year in compliance with this Directive, and a copy of each such report.

C. The Deputy Assistant Secretary of Defense (Administration), OASD(C), the Secretaries of the Military Departments, and the Directors of the Defense Agencies will:

1. ~~Except as provided in 7 below:~~ Notify each person in the categories described in subsection IV., A., B., and C., of the requirements of this Directive and reference (a), and provide to each such person a copy of this Directive or implementing Military Service or Defense Agency regulations together with a supply of the forms prepared in accordance with the reporting format as set out in enclosure 1. In the case of personnel being separated or retired this notification will be included in the exit interview or separation counselling procedures. Civilian personnel who become subject to the reporting requirement on initial employment will be notified of this reporting requirement during the entrance orientation. Civilian personnel who become subject to the reporting requirement by virtue of a promotion or step increase after initial employment will be notified of the reporting requirement at the time of such promotion or step increase.
2. Review reports as described below and furnish these reports and the list referred to in VII. B., to the Assistant Secretary of Defense, Manpower and Reserve Affairs, by February 28 of each year: ~~beginning in 1971~~

- 3. It is recognized that personnel notification of each affected
 - ~~former military officer and civilian employee who was sepa-~~
 - ~~rated before the publication of this Directive is not feasible.~~
 - However, intensive information efforts will be undertaken
 - using all appropriate channels with the objective of bringing
 - the requirements of reference (a) and this Directive to the
 - attention of all such former personnel.

In the case of military personnel, the actions prescribed by this paragraph will be taken by the Military Department concerned for all affected military personnel of that department, even though the member's last assignment was with another department or agency.

VI. OTHER REPORTING REQUIREMENTS

The reporting requirements prescribed by this Directive are in addition to the reports required from Retired Regular officers (DD Form 1357) and the statements of employment and financial interests required of certain civilian employees and active duty military officers (DD Forms 1555 and 1555-1) under the provisions of DoD Directive 5500.7.

VII. REVIEW OF AND DISPOSITION OF THE FORMS SUBMITTED BY FORMER AND PRESENT PERSONNEL

A. The Deputy Assistant Secretary of Defense (Administration), OASD(C), the Secretaries of the Military Departments and the Directors of the Defense Agencies will establish procedures to review the forms submitted by former and present personnel in accordance with the terms of this Directive to determine whether:

1. Each form as submitted is in fact required under the terms of the Directive.
2. All required information has been furnished.
3. The information as submitted indicates the possibility of a violation of law or Directive.

If there is any indication that a law or Directive may have been violated, the matter will be referred to the appropriate authority of the office, Department or Agency concerned to determine the action which should be taken.

Oct 30, 70#
7700.15

B. Not later than February 28 of each year, the Deputy Assistant Secretary of Defense (Administration), OASD(C), the Secretaries of the Military Departments, and the Directors of the Defense Agencies will forward to the Assistant Secretary of Defense (Manpower and Reserve Affairs):

1. A listing of the names of individuals submitting reports, segregated by the defense contractor by whom now or formerly employed, or for whom they performed services. The list will be prepared in accordance with the format prescribed in enclosure 2, and will be submitted in triplicate.
2. Three copies of each report, submitted in accordance with section IV.

C. This reporting requirement has been assigned Report Control Symbol DD-M&RA(A)1051.

D. Not later than March 31, thereafter, the Assistant Secretary of Defense (Manpower and Reserve Affairs), will forward a copy of all such listings and reports to the President of the Senate and the Speaker of the House of Representatives as prescribed in V. B. 2.

VIII. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective immediately. Two copies of implementing instructions shall be forwarded to the Assistant Secretary of Defense (Manpower and Reserve Affairs) within 60 days.



Deputy Secretary of Defense

Enclosures - 2

1. Instructions for Completing DD Form No. 1787
2. Listing of Present and Former Employees

Oct. 30, 70*
7700.15 (Encl 1)

INSTRUCTIONS FOR COMPLETING ENCLOSURE 1.

Before beginning to complete DD Form No. 1787 read carefully DoD Directive 7700.15.

The following numbered instructions are keyed to the numbered items on DD Form No. 1787.

1. Self explanatory
2. Self explanatory
3. Self explanatory
4. For the purpose of this reporting requirement:

(a) a "retired officer" is one who is presently entitled to receive military retired pay even though he may have waived such pay;

(b) a Reserve officer, not on active duty who is not a "retired officer" as defined in (a), is a "former officer" for the purpose of this report even though he currently holds a commission in a Reserve component; and

(c) persons formerly in GS-13 and above are subject to the filing requirement. In addition persons formerly in the Civil Service including Wage Board employees, employees in the lower General Schedule grades, P. L. 313 categories, consultants, and persons in the Executive levels whose rates of pay on an annual basis would have equaled or exceeded the amounts set forth in the following years are subject to the filing requirement.

	<u>Fiscal Year</u>	<u>Amount</u>	
*	1973	\$19,700	1
*	1974	\$20,677	2
*	1975	\$21,816	3
*	1976	\$22,906	4

5. The "employer" should be clearly identified. The term "employer" also includes the organization for which the services as a consultant were provided.

#Third amendment (Ch 3 (REPRINT), 6/14/76)

Oct. 30, 70
7700.15 (Encl 1)

6. If employed by 2 or more defense contractors include date of acceptance of employment (and termination of employment) by each. Use a continuation sheet if necessary.
7. Self explanatory
8. Include sufficient detail to clearly identify employing agency.
9. If more than one position held, give position title and brief description of work performed for each position.
10. Give sufficient detail to permit clear understanding of work actually being performed.
- 11, 12, 13. Self explanatory
14. Give sufficient information to clearly identify the Defense Contractor. If employed by more than one, list each.
15. If employed by, or served as a consultant to more than one defense contractor, give inclusive dates for each.
16. Give sufficient detail to permit clear understanding of work actually performed.
17. Enter signature as usually written.

7700.15 (Encl 2)
Oct 30, 70

(Sample Listing)

Department or Agency

Listing of Present or Former Employees
of
Defense Contractors for FY _____
Prepared Pursuant to Section 410, Public Law 91-121

XYZ Corporation
(Name of Contractor)

Reporting Category A

<u>Last Name, First, Middle Initial</u>	<u>Grade</u>	<u>Last Day of Active Duty</u>
Doen, John A.	Lt. Col.	May 31, 1968
Roen, Richard N.	Col.	July 31, 1968

Reporting Category B

<u>Last Name, First, Middle Initial</u>	<u>Grade</u>	<u>Last Day of Active Duty</u>
Renn, William A.	Major	December 31, 1968

Reporting Category C

<u>Last Name, First, Middle Initial</u>	<u>Grade</u>	<u>Last Day of Federal Employment</u>
Penn, Donald R.	GS-12 (Step 7)	March 15, 1968

Reporting Category D

<u>Last Name, First, Middle Initial</u>	<u>Grade</u>	<u>Date Entered Present Employment</u>
Robin, Ronald R.	GS-14	July 1, 1969

- Note: 1. "Reporting Category" - those categories listed in Item 4, DD Form 1787.
2. Use a separate sheet for each contractor.
3. Arrange names alphabetically within category.

(Sample Listing)

#First amendment (Ch 2, 1/22/75)

7700.15 (Encl 1)
Oct. 24, 72

REPORT OF DOD AND DEFENSE RELATED EMPLOYMENT AS REQUIRED BY PUBLIC LAW 91-121		DOD Approval No. 22-R0268
1 NAME (Last - First - Middle)	2 CURRENT HOME ADDRESS (Street - City - State - Zip)	3 SOCIAL SECURITY NO.
4 REPORTING CATEGORY (Check appropriate box and enter in space provided the military grade, civilian grade or annual DoD salary. A ☐ RETIRED MILITARY OFFICER - MAJ/LT CMDR OR ABOVE _____ B ☐ FORMER MILITARY OFFICER - MAJ/LT CMDR OR ABOVE _____ C ☐ FORMER CIVILIAN EMPLOYEE WHOSE SALARY WAS EQUAL TO OR ABOVE MINIMUM GS-13 DURING THREE YEARS PRECEDING TERMINATION OF SERVICE WITH DOD _____ D ☐ FORMER EMPLOYEE OF OR CONSULTANT TO DEFENSE CONTRACTOR WHO DURING LAST FISCAL YEAR WAS EMPLOYED BY DOD AT SALARY EQUAL TO OR ABOVE MINIMUM GS-13 SALARY _____ Item- 5 thru 10 apply to reporting categories A, B and C ONLY		
5 NAME AND ADDRESS OF DEFENSE CONTRACTOR EMPLOYER(S)		
6 DATES OF ACCEPTANCE OF EMPLOYMENT WITH DEFENSE CONTRACTOR EMPLOYER(S) (if no longer employed by a defense contractor employer give inclusive date of all such employment)		
7 DATE OF SEPARATION FROM ACTIVE DUTY OR TERMINATION OF DOD EMPLOYMENT		
8 NAME IN DETAIL OF LAST AGENCY OF DOD BY WHICH EMPLOYED		
9 POSITION TITLE(S) AND BRIEF DESCRIPTION(S) OF WORK PERFORMED DURING LAST THREE YEARS OF YOUR SERVICE WITH DOD		
10 POSITION TITLE(S) AND BRIEF DESCRIPTION(S) OF WORK PERFORMED FOR DEFENSE CONTRACTOR EMPLOYER(S)		
Item- 11 thru 16 apply to reporting category D ONLY		
11 NAME IN DETAIL OF DEPARTMENT OF DEFENSE AGENCY BY WHICH EMPLOYED AT ANY TIME DURING THE LAST FISCAL YEAR		
12 DATE ACCEPTED DOD EMPLOYMENT		
13 POSITION TITLE(S) AND BRIEF DESCRIPTION(S) OF DUTIES WITH DEPARTMENT OF DEFENSE EMPLOYER DURING LAST FISCAL YEAR		
14 NAME(S) OF DEFENSE CONTRACTOR(S) BY WHOM YOU WERE EMPLOYED OR WHOM YOU SERVED AS A CONSULTANT OR OTHERWISE		
15 INCLUSIVE DATES OF EMPLOYMENT BY OR SERVICE WITH DEFENSE CONTRACTOR EMPLOYER(S)		
16 POSITION TITLE(S) AND BRIEF DESCRIPTION(S) OF WORK PERFORMED FOR DEFENSE CONTRACTOR(S)		
17 I CERTIFY THE ABOVE INFORMATION IS CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF		
SIGNATURE		

(If additional space is required, attach a continuation sheet)

DD FORM 1 JAN 71 1787

Agency Ethics Officers Fear Meese Ruling Could Weaken Conflict Laws

The agency officers take issue with the head of the Government Ethics Office, who called the admonition to avoid the appearance of impropriety only a goal.

BY RONALD BROWNSTEIN

Last January, David H. Martin, director of the Office of Government Ethics, sent a letter to Strom Thurmond, R-S.C., chairman of the Senate Judiciary Committee, that may mark a turning point in the interpretation and enforcement of federal ethics laws.

Martin, whose office oversees federal agency ethics programs, sent the letter in connection with his staff's review of whether Edwin Meese III had violated federal ethics standards in his role as counselor to President Reagan. In the letter, Martin concluded that the requirement in the White House code of conduct that employees "avoid any action . . . which might result in, or create the appearance of" impropriety was, in his words, only "aspirational in nature," that is, only a goal, not a rigid rule.

Martin's analysis took aim at a basic component of federal ethics standards. Agencies throughout the government impose the same requirement as the White House code. They all base the requirement on identical language in regulations drawn from a 1965 executive order that sets the minimum ethical standards for agency codes of conduct.

In his subsequent testimony before the Judiciary Committee on Meese's nomination to be Attorney General, Martin expanded his argument, insisting that appearances of impropriety—as opposed to actual conflicts of interest—are "problems," but not by themselves violations of the federal standards. "Certainly you want to caution against avoiding appearances, but I just don't see how you can label that a violation," he said.

That argument was probably news to the Housing and Urban Development Department (HUD) appraiser who was fired in 1979 for managing two slums in Chicago owned by his wife, to the Navy data

processing administrator at a Puget Sound (Wash.) shipyard who was demoted to a nonsupervisory position in 1983 for working on a computer package for pharmacies with a company that held a contract with the shipyard, or to the federal coal mine inspector who was suspended for 30 days in 1984 for writing a letter to a coal company alleging that it turned down his sons' job applications because he had issued citations against the firm.

In none of these cases did the agencies prove that the employees' conduct had damaged their on-the-job performance or

attempted to fire the employees, but it upheld the agencies' contentions that violations of their standards had occurred.

The sweeping impact of Martin's assertion in the Meese case was not fully noticed amid the controversy over Meese's nomination. But his remarks surprised many ethics experts throughout the government and Congress—including the so-called "4-C" agency ethics officials charged with supervising compliance with federal ethics standards and laws at each agency—who consider it a new interpretation of the ethics standards.

"He's wrong," said Sen. Carl Levin, D-Mich., ranking minority member of the Governmental Affairs Subcommittee on Government Management, which oversees the government ethics office. "The executive order is clear and binding, and appearances of impropriety are prohibited. . . . He cannot unilaterally change the law."

The current state of the law notwithstanding, Martin may open up a broader debate on the value of the appearance standard. Martin argues that current language allows agencies too much discretion to take personnel action against employees they don't like, and attorneys in his office are drafting language to revise both the executive order and its implementing regulations.

"Take a look at the language in the executive order: 'might result in or create [the appearance of] an impropriety,'" Martin said in an interview. "You can hang anybody on that language. That's my problem with it. A guy who wants to screw you [by disciplining you for violating it] can screw you. . . . It is not a good enough standard for me."

At the Meese confirmation hearings, Martin's criticism of the appearance standard as too vague drew extensive support from some surprising quarters,

David H. Martin, director of the Office of Government Ethics, wants to rewrite the federal conflict-of-interest rules, contending that they are too vague.

resulted in an actual conflict of interest. In each case, the sanction was imposed because the employee created the appearance of a conflict.

Martin's argument was also news to the Merit Systems Protection Board, an independent agency that reviews the propriety of disciplinary actions against federal employees. In each of these cases, the board had agreed that the employees had violated agency ethics standards by creating the appearance of a conflict. In the cases involving the mine inspector and the Navy data processor, the board reduced the penalties after the agencies

notably Joseph R. Biden Jr., D-Del., the committee's ranking minority member. But any effort to change the standard would also draw extensive opposition.

The Government Management Subcommittee is planning an oversight hearing in April to examine the complex issues raised by Martin's analysis in the Meese case. The subcommittee also plans to assess over-all enforcement of the federal ethics laws, including the restrictions on lobbying by former federal employees. Ethics officials at several federal agencies agreed in recent interviews that the requirements are, in many cases, virtually impossible to monitor. (See box, p. 641.)

FALLOUT

Rippling through these disputes over the ethics standards are the lingering aftershocks of the Meese controversy.

Some observers worry that the case hurts the usually uphill efforts of agency ethics officers to get senior officials to take the financial disclosure requirements seriously and report their holdings with care. Meese, for example, repeatedly omitted information on personal loans from his financial disclosure reports and, in 1982, failed to report a controversial stock purchase made with one of the loans.

In his report last September, Jacob A. Stein, the independent counsel who investigated Meese, noted Meese's "general lack of attention to the [financial disclosure] forms." But Stein concluded that no prosecution was warranted for the omissions.

Several agency ethics officials said that even though no sanctions were imposed, the attention given the Meese case—along with the well-publicized financial disclosure problems of former Reps. George Hansen, R-Idaho, and Geraldine A. Ferraro, D-N.Y.—has made senior officials more attentive to their financial disclosure responsibilities.

"Since [all of these cases], we don't have a lot of trouble getting people to file them," said Gabriele Paone, the alternate ethics officer at the Interior Department. "They don't like to file them, [but] people have become a lot more sensitive about filling out the form."

However the financial disclosure problems of Meese, Hansen and Ferraro may have affected other officials' thinking, the controversies have probably grounded the Reagan Administration's hopes of revising the financial disclosure requirements. Early in Reagan's first term, a parade of Administration officials complained that the disclosure requirements inhibited their recruiting efforts because "talented individuals otherwise willing to serve have concluded that public disclosure is too high a price to pay."



Attorney General Edwin Meese III

as White House counsel Fred F. Fielding put it at the time.

In 1982, Jonathan C. Rose, then the assistant attorney general in charge of the Justice Department's Office of Legal Policy, said that the most politically opportune time for revising the disclosure requirements would be the first year of a President's second term. Martin has prepared draft legislation to eliminate some detail currently required on the forms, such as the requirement that officials must give the value of their assets.

But both Martin and the White House acknowledge that Congress is extremely unlikely to reduce disclosure requirements. "The Administration has baggage it can't get out from under," said G. Calvin MacKenzie, director of the National Academy of Public Administration's presidential appointee project.

"ASPIRATIONAL" STANDARDS

Clearly, the most tangible and direct impact of the Meese controversy on federal ethics standards is Martin's conclusion that the provisions in the standards of conduct relating to appearances of impropriety are only "aspirational."

A half-dozen agency ethics officers interviewed recently said they have traditionally viewed an appearance of conflict and an actual conflict on equal terms, not in determining penalties—as the merit board's decisions demonstrate—but in assessing whether a violation has occurred.

"The appearance of a conflict isn't just aspirational," said Rutgers University

general counsel David R. Scott, acting director of the Government Ethics Office before Martin and the agency's general counsel before that. "The regulations are written in such a way, and have always been interpreted, that appearance is an aspect of the standards of conduct that stands on an equal par with actual conflict."

Sen. William S. Cohen, R-Maine, the chairman of the Government Management Subcommittee, agreed. "Mr. Martin's position deviates from the past position of the office of government ethics. . . . It is unprecedented. Frankly, the statute doesn't read that way," he said.

Martin said he has considered the appearance provisions to be aspirational "for nearly as long" as he has been director, but the issue first appeared prominently in the Meese investigation.

On Jan. 14, two attorneys in Martin's office completed a report that concluded Meese had violated the federal code of conduct by, among other things, creating the appearance of a conflict by his participation in White House decisions to offer federal jobs to John R. McKean and Thomas J. Barrack Jr., with whom Meese had financial dealings. The report specifically cited language in the standards of conduct that directed employees to avoid even the appearance of impropriety.

In his Jan. 28 letter to Thurmond, in a letter the following day to Thurmond and Biden and in his subsequent testimony before the committee, Martin indicated that through "robust, open and free exchange," he and the staff concluded that Meese engaged in no direct conflicts of interest and that only the McKean case rose to the status of an "appearance problem."

At that point, Martin wrote in his first letter to Thurmond, "it was incumbent upon me to look behind the appearance to determine if there was any substance to the appearance. Based on the facts as developed, I satisfied myself that this was an appearance problem only." Hence, he said at the committee hearing, "I determined that [Meese] did not violate any ethical standards. . . . Appearance is one thing. An actual violation of some standards of conduct or some law is quite another thing."

It is that assertion—that the appearance of impropriety is not a violation—that has brought on the controversy and

both intrigued and outraged federal employee unions.

It has not been unusual for agencies to impose sanctions—ranging from letters of reprimand to dismissals—against employees for creating the appearance of impropriety. "People are constantly disciplined and discharged based on the appearance of an impropriety," said Robert M. Tobias, president of the National Treasury Employees Union, which represents 120,000 federal employees.

Nor has it been unusual for the merit board to impose personnel sanctions for the appearance of impropriety. In its 1983 decision on the Navy data processor who was demoted for the appearance of conflict, the board wrote: "The charges for which [the employee] was removed [the original penalty the Navy imposed] are serious. This board has sustained removals based on the charge of creating an appearance of conflict of interest.... Creating the appearance of a conflict of interest constitutes a serious breach of trust. The government clearly has an interest in prohibiting such conduct...."

Asked about the precedent of disciplinary actions based on appearances, Martin said, "It is unfortunate that somebody wasn't required to and didn't look at this before and say, 'Hey, this is aspirational' and ask, 'Should we be disciplined for appearances?'"

As precedent for his analysis, Martin cited a 1983 decision by the U.S. Court of Appeals for the Federal Circuit involving not a personnel matter but a contract dispute between the Justice Department and CACI Inc., a data processing supplier. The court overturned a U.S. Claims Court decision that had invalidated a department contract granted to a CACI competitor because the contracting process offered the "opportunity for and the appearance of impropriety."

In its decision, the appeals court wrote that the federal standard barring actions that "might result in or create the appearance of" impropriety does "not create specific and precise standards, the violation of which would justify enjoining the department from awarding a contract."

In a Senate floor statement, Levin contended that the case "really addressed another matter" than that involved in Martin's interpretation of the law; the contracting case, his aides argue, deals with determining the proper consequence of a violation of the standards of conduct but does not directly address whether an appearance of impropriety violates the standards.

Martin acknowledged that "personnel actions maybe are a little different" than the contracting question addressed in the CACI ruling. But, he added, "it is clearly articulated in that case that there is a

Life After Federal Work

Do restrictions on post-employment lobbying by former federal officials work? Consider the plight of Gerald H. Yamada, acting general counsel and ethics officer at the Environmental Protection Agency (EPA), who is charged with enforcing them.

He doesn't know where the former officials are working because there is no requirement that they tell him when they leave. He doesn't know whether their new responsibilities bring them in contact with the agency because there is no requirement that they notify him. And he doesn't know whom they are talking to at EPA because the agency is an awfully big place, with a lot of telephones. "There are agencies who say they are monitoring" the post-employment restrictions, Yamada said. "Frankly, we are somewhat at a loss as to how to do that."

Last fall, a Common Cause survey of agency ethics officials found that "monitoring of compliance with post-employment restrictions varies greatly." Of 50 agencies surveyed, only 16 said they frequently monitored compliance.

But even that result unquestionably overstates the extent of actual oversight. The Tennessee Valley Authority, for example, which told Common Cause it frequently monitored the restrictions, relies primarily "on institutional memory" for the job, said Herbert S. Sanger Jr., the TVA's general counsel. "When we see one of our former employees showing up, someone [usually] knows that employee," he said, and notifies Sanger. "I won't say it is done through some kind of ornate system, because it is not."

The Justice Department is unable to identify any cases brought for violations of the post-employment restrictions since the Ethics in Government Act was adopted in 1978. And in a 1983 study, the General Accounting Office was able to find only one administrative sanction—a five-year ban on contact with an agency—for violation of the provisions.

Under the ethics act, federal employees are free to pursue any kind of post-government employment they wish. But the law imposes four broad restrictions on former employees:

- a lifetime ban against acting as a representative on "particular"—as opposed to broad policy—issues that involve a specific firm or individual, on which the former employee substantially participated in government, such as a contract or antitrust case;
- a two-year ban against acting as a representative on such particular matters involving a specific party that were under the former employee's supervisory authority during his or her last two years in government;
- a two-year ban on senior employees' making personal appearances, even silent ones, on particular issues in which they substantially participated;
- a one-year, far-reaching ban on senior employees' lobbying their former agencies on anything but the broadest policy issues.

Ethics officials throughout the government say there is no practical way to track former employees' contacts with their old agencies, beyond formal appearances that are relatively easy to monitor. All they can do, they say, is counsel employees on the law when they leave, explain the restrictions to current employees and then hope for the best. "It is almost self-enforcing," said H. Lawrence (Larry) Garrett, associate counsel in the White House. "That is about the only way that you can work it."

Recently, several Members of Congress introduced bills to toughen post-employment restrictions for government employees involved in contracting decisions. Their actions were spurred by stories in newspapers around the country about former Pentagon officials who have gone to work for large defense contractors.

California Democratic Reps. Barbara Boxer and Mel Levine have introduced a bill (HR 1201) that would bar government procurement officials from joining firms whose contracts they worked on until five years after expiration of the contract or five years after they leave government, whichever comes first. Sens. Tom Harkin, D-Iowa, and David Pryor, D-Ark., with six co-sponsors, have introduced identical legislation (S 490). Sen. William Proxmire, D-Wis., has filed a bill (S 385) with a two-year ban for former procurement officials. And Sen. Carl Levin, D-Mich., plans another.



Sen. Carl Levin of Michigan

difference between an appearance and an actual [conflict], and it stands clearly for that proposition."

Other courts, ruling directly on personnel actions, have upheld agency sanctions based on the appearance of impropriety. One such case involved Lawrence A. Wild, the HUD appraiser fired in June 1979 for managing two tenements owned by his wife.

Wild appealed the decision to the merit board, and a hearing officer threw out two of HUD's charges: that Wild directly violated financial conflict-of-interest provisions and that he falsified a financial disclosure form. But the hearing officer, subsequently supported by the full board, sustained the dismissal on the ground that Wild's "involvement with these deteriorated urban properties was in conflict with the general principle of the agency's standards of conduct requiring employees to avoid any involvement, 'real or only apparent,' tending to damage ... the public's confidence in the integrity of the agency ..." as the board wrote in its ruling.

In a November 1982 decision, the U.S. Court of Appeals for the 7th Circuit upheld the board's ruling and specifically supported its reliance on the agency's basic principles of conduct for the dismissal. In his decision, Judge Richard A. Posner, a Reagan appointee, rejected (as the merit board had) Wild's contention that HUD's basic principles—which contain the warning to avoid any involvement, "real or only apparent," that might

"reduce public confidence ... in the department"—were too vague to serve as the basis of a disciplinary action.

"The evident purpose of the code," Posner wrote, "is to make conduct that is not necessarily forbidden by any express regulation a ground for separating an employee from HUD."

Similarly, in a 1981 case, the U.S. Court of Appeals for the 1st Circuit upheld a lower court ruling requiring a former HUD appraiser to repay the government \$348,511 for the sale of property on which relatives and family controlled corporations had obtained FHA mortgages. The court concluded that because the department's code of conduct barred even the appearance of conflict of interest, HUD did not need to determine whether the appraiser was personally involved in all the actual appraisals to require him to give up all his profits. "These regulations by their terms proscribe apparent as well as actual conflicts of interest," the court wrote.

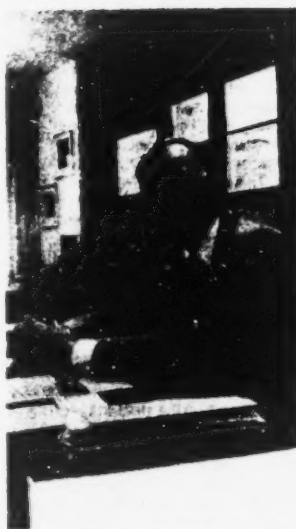
IMPACT

The immediate impact of Martin's interpretation on appearances of impropriety is not yet clear. Dennis M. Devaney, one of the three members of the Merit Systems Protection Board, said, "Martin would be owed some deference because he is head of the Government Ethics Office, but it is really the board or the courts who are going to decide these things."

For now, ethics officers say they will continue to treat appearances of impropriety as violations of their codes of conduct. "It is in the regulations [the Government Ethics Office] has put out, it is in our regulations, it is a concern we will continue to have," said Gerald H. Yamada, acting general counsel of the Environmental Protection Agency. "I've never seen anything to suggest that appearance is not something we would prosecute for," said a personnel attorney at a Cabinet department.

Nonetheless, Martin's view may still significantly change enforcement of the ethics laws. Unions for federal workers say they plan to cite Martin's decision in the Meese case as precedent whenever a federal employee is charged with an appearance violation. "I think they should," Martin said.

Moreover, the U.S. Court of Appeals for the Federal Circuit now has exclusive review authority over most decisions made by the merit board. And, whether or not that court's decision in the CACI contracting case directly addresses the issue raised in the Meese case, it may indicate a receptivity to Martin's position that could be amplified in future personnel decisions.



Ethics director David H. Martin

In that decision, the court described the federal code of conduct's basic admonition to avoid real or apparent improprieties as "general standards to guide government employees."

The most direct change will come if Martin succeeds in his objective of revising both the executive order and the regulations implementing it to bring them more in line "with what I think is reality." But key White House officials appear cool to the idea of attempting to rewrite the order, and any proposal to formally eliminate the appearance standard would undoubtedly provoke intense political controversy.

Agency ethics officers acknowledge that the appearance standard is difficult to work with because it involves subjective judgments, but those officers interviewed supported its retention. "It is a difficult standard for us to carry out, but it is something we need," said EPA ethics officer Yamada, who is given high marks for strengthening the environmental agency's ethics programs since he took it over in 1983. "It goes to the agency's credibility."

Martin is aware of the difficulties in trying to change the executive order. But he is planning to push his analysis in whatever forum he can. "If we can't do it by regulation, maybe eventually the theory in the CACI case will be extended to personnel actions as well as [contracting] ... It may end up," he said, "that the courts will decide if I'm right or wrong." □